

Section 12 guidance

Section 12 of the FOI Act can be quoted if the estimated cost of determining whether information is held and providing it would exceed the appropriate limit of £600 (as set out in the Appropriate Limit and Fees Regulations 2004). The estimate must be a reasonable one.

The appropriate limit is calculated by reference to staff time that has or would be exceeded in responding to the request.

Authorities can only calculate staff time at a cost of £25 per person p/h, making the appropriate limit 3½ days or 24 hours (set out in the *Appropriate Limit and Fees Regulations 2004*, SI 2004 No. 3244) – see below:

<http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

The following 4 activities can be taken into account for s12:

- finding;
- locating;
- retrieving and;
- extracting the information,

NB: any time taken to:

- 1) redact material within scope of the request;
- 2) decide on redacting or deciding whether to disclose or to redact information under any exemptions; and
- 3) Collate or prepare in a format specifically requested by the applicant does **NOT** count towards the time limit.

We need to provide reasonable and convincing evidence, estimates and calculations that the above would exceed the cost limit.

Searching for the information

Although we are not obliged to search for information before refusing, we do need to make a reasonable estimate and provide arguments and/or evidence in support of our estimate. These need to be given to the requestor so they can understand why the request was refused.

Best practice is to provide estimates based on actual searches for information. It often becomes apparent that s. 12 applies after initial searches have been carried out and the full extent of potential information that is held is realised. We should always establish whether information is held, and not provide a blanket response based on what may be held.

To note:

- We can stop searching for information as soon as it is clear that fully complying would exceed the limit
- We are not obliged to search up to the limit

Estimates and calculations

It is a requirement of law that we have a reasonable basis for the estimate.

In order to provide any kind of reasonable and convincing estimate, we need to be aware of what potential information is held. This cannot be conjecture. If the necessary searches have been done, it should be possible to provide details of the quantity and nature of the information held. This will determine what amount of time it is reasonable for us to quote for reading and extracting data from each individual record in order to provide a calculation of the total time it is likely to take.

It is not possible to provide a standard time to quote for finding, retrieving and extracting data from a single record as it will vary from case to case. Estimates varying from 30 seconds to several minutes have been used in the past, but this is determined by factors such as the form information is held in, how accessible it is, how easy it is to search and read through and the complexity of the requested information.

A principal issue which varies between cases is whether the request is for information that will present itself as a minor point in many documents or whether it is a significant issue in itself, where the whole or nearly the whole of the document will be relevant. The time taken to identify the latter might be as little as 30 seconds and even less if it was apparent from the title of the document that it was all going to be relevant, whilst it could take considerably longer to identify the former.

However, none of this can be established until at least some of the information has been found, retrieved and read through.

Evidence and sampling exercises

If it is apparent that there is a very large amount of potential information held on record that would need to be found and looked through to determine what is in scope then it is clearly not practical to try and find everything in order to provide a calculation. In such cases it is necessary to support the s. 12 claim by providing evidence from a sampling exercise broadly representative of the amount of documents likely to be in scope.

A random selection of files could be chosen or a selection of files from each of the years referred to in the request or from each relevant policy team or area. If for example, the records were all held on Contact, then the first 20 or 50 could be used to calculate an average time to find, locate, retrieve and extract the relevant information.

Please note: any time that is expended on any of the above activities *i.e. running any searches, locating and retrieving any data or conducting a sampling exercise* should be noted. Any amount of actual time spent on these activities, when trying to comply with the request, can be added to the estimated time it would take to fully comply with the request.

Section 16 of the FOI Act

We have a duty to provide advice and assistance to the requestor. To satisfy these requirements, when quoting a s12 exemption, we need to:

- Indicate if it is not possible for us to provide any information at all within the appropriate limit; or
- provide an indication of what information could be provided within the appropriate limit; and
- provide advice and assistance to enable the requestor to make a refined request.

The more thorough our searches, the more detailed a breakdown of information that we hold can be provided to the requestor at initial stage. This should allow them to submit a further narrower request which could be met within the s12 limit.

The ICO ask for evidence that s16 has been satisfied when dealing with any complaints about the use of s12.

Examples of successful reviews following challenge of the application of s.12

760839R [REDACTED]

We maintain that in order to comply with your request, as worded, would engage s12 of the FOI Act. Below we have provided the necessary evidence and calculations for invoking this exemption.

Description of records held

Each individual item of correspondence received by or sent from Sir David Nicholson, (letter or email), was saved and stored either on a shared drive or in the Department's central electronic document storage system (MEDS). Any hard copy letters were scanned and saved as electronic records before storing by one of these two methods.

To determine whether any of these items of correspondence was received from or addressed to, an NHS address it would be necessary to open each one individually and review the relevant fields.

For ease of working, David Nicholson used one email account in both of his roles as NHS Chief Executive and Chief Executive of NHS England, so all email traffic to and from David Nicholson would have been sent to and from this DH email address.

Similarly, all postal correspondence was sent to and from his DH contact address.

We hold records from the time David Nicholson joined the Department in September 2006. Our search therefore covered the period from September 2006 to August 2012.

These records are held in two different storage systems, within four file structures. The first set of records is stored within two shared drive files. The first of these holds 3,780 records; the second 2,238 records.

In addition, there were two MEDS file registers used for storing records relating to the work of Sir David:

- NHS CE – comprising 81 folders that hold a total of 23,192 records that would need to be opened and reviewed to confirm if any contain relevant information (September 2006 - December 2009).
- ONLET – comprising 94 folders that hold a total of 19,155 records that would need to be opened and reviewed to confirm if any contain relevant information (January 2010 - August 2012).

It took one member of staff 3 hours to locate and calculate the number of records in these folders.

As it is not possible to conduct a further search on these records to isolate only those containing NHS addresses, it would therefore be necessary to open each of these individual records to determine which were from or to an NHS addressee.

Sampling exercise and calculation for the purposes of applying s12

In order to calculate how much time would need to be spent in meeting this FOI request we have carried out a sampling exercise using records held in a random month.

We have looked at the records held for January 2011 in both the shared drives and in MEDS.

The shared drive contained 64 records (38 documents received by Sir David and 25 sent by Sir David). It took one member of staff 15 minutes to review the documents for NHS addresses.

Of the two folders within MEDS that contained potential records; one folder contained 703 records and the second folder contained 73 records. For the purposes of sampling, a search was carried out on the 73 records in the second folder. This took one member of staff 20 minutes to review the documents for NHS addresses.

From the above sampling, we estimate that it would take approximately 15 seconds to open and review an individual record to determine if it was sent to or received from an NHS address.

The potential number of records held that fall within scope of this request is 48,365. Allowing 15 seconds to search through each one of these records to determine if it contains relevant information would take a total of 201.5 hours to accomplish.

If we add the time it has already taken us to find, locate, retrieve and extract information in scope of this request, we calculate that it would take in excess of 205 hours to fully comply with this FOI request.

Narrowing the request

Where we have applied a s. 12 exemption we have a duty under section 16 of the FOI Act to provide you with advice and assistance about ways to refine your request.

Your request as currently worded covers a broad time frame spanning more than 72 months of records. The NHS Chief Executive receives a huge volume of correspondence by post or email on a daily basis.

If you were to refine your request to a much shorter time scale, or request correspondence from named individuals or organisations, or specify correspondence on certain topics such as finance or maternity, then we might be able to process your request.

However, the Department cannot guarantee that section 12 or any other exemption will not apply to any further narrowed request.

731197R [REDACTED]

We have considered again whether it was correct to apply Section 12(1) of the FOI Act in relation to this request.

When undertaking the original search for information, we conducted a search across our electronic files, using the search term, "Sports and Remedial Therapies Council". This identified over 300 electronic documents which would need to be interrogated to ascertain whether any of them contained information covered by your request. We calculated that the work required to locate, retrieve and extract any relevant data from these documents would exceed the threshold of three and a half working days.

As part of the review process the Department has now considered other search criteria which might also produce results relevant to your request. A search was undertaken on the phrase "Complementary and Natural Healthcare Council", which identified 4585 records. A further search was carried out using the term "CNHC", which produced 3377 records. We would need to search through the combined total of 8262 records to establish whether they contained information relevant to your request.

Whilst some of these records may be emails, others will contain one or more document attachments which could range in size from one page to easily in excess of ten pages.

As we cannot be precise on the number of pages in any document until they are viewed, we consider that a reasonable amount of time to locate, retrieve and extract relevant information from each record identified would be a mean average of five minutes.

If we apply this formula to the 8262 electronic records, it would take us in excess of 86 days to handle your request, which far exceeds the cost limit set out in section 12(1) of the Freedom of Information Act.

We consider our original decision to withhold the information you have requested under section 12(1) of the FOI Act to be correct and wish to uphold our use of this exemption at internal review, for the reasons explained above.

We also note that you have not sought to limit the scope of your request as suggested in our original reply.

Should you now wish to narrow your request to a specific timeframe, the information below should provide you with an idea of the number of documents held by the Department per year, per search term. The below is a sample of years relating to when the Department funded the Complementary and Natural Healthcare Council.

YEAR	SEARCH TERM	NUMBER OF DOCUMENTS
2007	<i>Sport and Remedial Therapies Council</i>	11
	<i>Complementary and Natural Healthcare Council</i>	0
	CNHC	124
	Total	135
2008	<i>Sport and Remedial Therapies Council</i>	15
	<i>Complementary and Natural Healthcare Council</i>	195
	CNHC	430
	Total	640
2009	<i>Sport and Remedial Therapies Council</i>	47
	<i>Complementary and Natural Healthcare Council</i>	901
	CNHC	1075
	Total	2023
2010	<i>Sport and Remedial Therapies Council</i>	74
	<i>Complementary and Natural Healthcare Council</i>	1269
	CNHC	1216
	Total	2559
2011	<i>Sport and Remedial Therapies Council</i>	32
	<i>Complementary and Natural Healthcare Council</i>	889
	CNHC	1138
	Total	2059