

# Advanced FOI training presentation: Section 12



## Content of today's training

1. Introduction to section 12
2. The appropriate limit and what is likely to constitute a reasonable estimate
3. Aggregation  
Short break
4. Transport for London case-study
5. Section 16 in relation to section 12

## Introduction

- Section 12(1) allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to do so.
- Section 12(2) allows a public authority to refuse to confirm or deny whether the requested information is held if this in itself would exceed the appropriate limit.
- Section 12 raises three main issues to consider:

## Introduction

1. What is the appropriate limit?
2. What activities can be taken into account in deciding whether the appropriate limit is exceeded?
3. What does the term "estimate" mean in practice?

## The appropriate limit

Regulation 3 of The Freedom of Information and Data Protection  
(Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244

- Central government, legislative bodies and the armed forces - £600
- For all other public authorities - £450
- Flat hourly rate of £25 per hour for all authorities
- Central government etc - 24 hours work @ £25 per hour = £600
- Other public authorities - 18 hours work @ £25 per hour = £450

**ico.**  
Information Commission for Wales

Need to advise that 2004 Regulations are usually referred to as the "Fees Regulations" but be aware of the full title so that can refer any relevant parties to the appropriate Regulations. The full title should also be used in decision notices at their first mention and thereafter they can be referred to by the abbreviated title

## Relevant activities

Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- 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.

**ico.**  
Information Commission for Wales

It is likely that any estimate will be largely or completely made up of the costs of staff time in carrying out the permitted activities. However, there may be other costs. The key to deciding whether any costs not in respect of staff time should be included in the estimate is whether it would be reasonable to include those charges. Although, the Commissioner has considered the reasonableness of the following specific charges:

- \* Computer queries/programmes – The PA may want to include the cost of buying an off-the-shelf computer programme which could retrieve the requested information from the public authority's computer system. The cost of this programme could be included in the estimate. Delegates need to be alert though that a public authority does not try to include contractors' costs in this way 'by the back door'. For example, a public authority may say that its' IT contractors could write a computer query to retrieve the requested information but as they would charge £1,000 for a day's work, then the appropriate limit is exceeded. This is not correct as the contractors' time can only be included at the rate of £25 per hour, irrespective of the amount actually charged by the contractors.
- \* Other costs may also include the costs of retrieving the requested information from off-site storage. Whether these costs can be taken into account depends on the terms of the contract between the PA and the storage company and the Commissioner may need

to see a copy of the contract to determine whether these costs can be included. See s12 Guidance for further details.

## Question

Which of the following activities can be taken into account when calculating an estimate?

- (1) The time it takes to decide whether any exemptions apply to the requested information
- (2) Emailing appropriate members of staff to ask if they know where the requested information is stored
- (3) The costs of staff time in photocopying the requested information and then re-filing the documents and files.
- (4) The time taken in removing or redacting any exempt information from the information to be disclosed

**ico.**  
Information Commissioner's Office

- (1) The time it takes in considering whether any exemptions apply CANNOT be taken into account.
- (2) The time it takes to email relevant members of staff to see if they know where the requested information is stored CAN be taken into account as it falls within one of the permitted activities under regulation 3, namely, locating the information
- (3) Any communication costs, for example, staff time spent on photocopying CANNOT be taken into account in calculating an estimate. In addition, the time taken by staff to re-file the relevant documents CANNOT be taken into account in a section 12 estimate.
- (4) The time taken, or likely to be taken, in removing any exempt information in order to leave the information that is to be disclosed, often referred to as 'redaction', CANNOT be included as part of the costs of extracting the requested information. This approach has been confirmed by the Information Tribunal in the case of *The Chief Constable of South Yorkshire Police v the Information Commissioner* (EA/2009/0029, 14 December 2009) and also by



the High Court on appeal ([2011] EWHC44 (Admin)). It might be useful to explain that public authorities may still argue that this time should be included under the 'extraction' heading but the ICO position is clear that this cannot be included.

## A reasonable estimate

- (1) An estimate
- (2) A 'reasonable' estimate
- (3) Consider on the particular facts of each case
- (4) Likely to be reasonable where the estimate is "...sensible, realistic and supported by cogent evidence."

ico.

This slide refers to the third issue raised by section 12 – namely, what does the term "estimate" mean in practice?

- (1) First of all, it is important to note that as section 12 refers to an "estimate", then a public authority is not expected to provide a precise calculation of the costs of dealing with the request.
- (2) However, whilst only an estimate is required – it must be a reasonable estimate. This is confirmed by regulation 4(3) which refers to the costs a public authority expects to "reasonably incur". The Tribunal in the case of *Urmenyi v IC* and the London Borough of Sutton (EA/2006/0093, 13 July 2007) also confirmed that the estimate must be reasonable.
- (3) The estimate must be based on the specific circumstances of the case i.e. if the information is only stored in paper form, then it is to be expected that this will take longer to search than if the same information was held electronically so that it could be searched more quickly. Similarly, an estimate is not invalidated because the public authority has poor records management meaning it will take longer to find the requested information than if it were filed correctly and in a logical manner.
- (4) The Tribunal in the case of *Randall v IC and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004, 30 October 2007) provided this quote and it is often referred to in decision notices, IT decisions etc. It's a useful explanatory note but it is important to point out that this is not a definitive definition and it should not be used to replace the real test – which is whether the public authority has provided a reasonable estimate.

Main point to make here is that delegates need to act as critical reviewers when looking at the reasonableness of any estimate i.e. would it really require the review of 2,500 files in order to locate the relevant information, would it really

take 1 hour to read one email, is it reasonable to say that it takes 5 minutes to skim read the front page of each file to find the requested information when the front page of the file is based on a standard template of which Q3 represents the requested information etc...

## A reasonable estimate

- Technically, only need to state reliance on s12 in refusal notice
- Useful to provide a breakdown:
  - (i) Good practice and customer service,
  - (ii) to support the estimate and
  - (iii) likely to be required under section 16 anyway



It's helpful to provide a breakdown for:

- (a) Good practice and customer service & also if a complainant can see how the estimate has been calculated, then it may help to avoid a complaint being made to the ICO which would save the PA costs
- (b) Supports the estimate - If a complaint is made to the Commissioner, he is likely to require full details of the way in which an estimate has been calculated in any event so doing this work at the outset is useful to avoid further work later on and in particular when it would require going back to the date of the refusal notice and working out the estimate.
- (c) Likely to be required under section 16 anyway – again, if it is likely to be required at some point it would make sense to provide the estimate at the time of providing the response when everything is fresh in the mind of the FOI Officer.

## Question

How can a public authority reach a reasonable estimate of the costs of answering a request?

ico.  
Information Commissioner's Office

Suggested answers will hopefully include:

- (a) Carrying out some searches for the information and on the basis of this exercise. For example, the public authority could explain that as it has taken 5 hours to look through 4 files, then it would definitely exceed the costs limit to search through the 150 files which may contain information which falls within the scope of the request.
- (b) Carrying out a sampling exercise e.g. picking a representative sample of files or records, for example, one file from each year of a multi-year request or one file from each relevant department
- (c) Providing further detail on the nature and extent of the requested information i.e.
  - Explaining why it would need to search the records it says it needs to search;
  - Explaining whether the records are held electronically or in hard copy and if it is the latter whether there are any indexes or other means of speeding up the search e.g. filing systems in date order etc
  - Providing details of the number of files to be searched i.e. 1,000 files for 2006, 250 files for 2007 or 5 files per person etc
  - Providing details of how long it would take to carry out the activities permitted by the Fees Regulations e.g. 1,000 files for 2006 – an average of 10 minutes to review each file and explaining why it would take an average of 10 minutes per file e.g. voluminous files which contain between 500- 3,000 pages etc

## Searches

- It is likely that a public authority will carry out some searches for the requested information before applying section 12
- Good practice to carry out some searches
- However, it is important to note that there is no obligation to search up to the appropriate limit

**ico.**  
Information Commission for Wales

A public authority is not obligated to search for or compile some of the requested information before providing its estimate and it can just rely on providing cogent evidence and/or arguments. However, in practice, it is likely that a public authority will carry out some searches either before it realises that section 12 is engaged or in order to provide some arguments or as a matter of good practice in strengthening the argument that its estimate is reasonable.

However, it is important to note that a public authority is not obligated to search up to the appropriate limit. For example, where a PA spends 6 hours searching for the information but then claims section 12 – the requestor cannot demand that they continue searching for another 12 or 18 hours (as appropriate). Although, it may be that the PA ends up working up to the appropriate limit following the provision of advice and assistance and where the requestor submits a refined request. For example, the PA says that it can search files for 2007 and 2008 under the costs limit and the requestor makes a refined request for the files for 2007 and 2008, then the PA will have to comply with the request.

It also does not have to estimate the costs of complying with a request before commencing its searches and if a public authority starts to carry out some searches without an initial estimate; it can still stop searching at any point. Also, even if a public authority does estimate at the outset that it can complete the searching under the

costs limit, it is not obligated to continue searching if it realises that it actually cannot comply with the request under the costs limit just because it initially said that it could complete the searches under the limit.

## Aggregation

- Regulation 5 of the Fees Regulations allow a public authority to aggregate the costs of dealing with more than one request where three conditions are met
- Condition one: *"The requests are made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign"*
- Note: it is only necessary for it *"to appear"* to the public authority that the requests are made by the same person or a group



## Aggregation

- The second condition set out in regulation 5 of the Fees states that the "*requests relate, to any extent, to the same or similar information*"
- This is a broad test but it should not be assumed that it will necessarily cover all the requests to be aggregated
- In deciding whether the requests meet this limb it may be useful to consider whether there is an overarching theme or common thread between the relevant requests but the test remains whether the requests relate, to any extent, to the same or similar information.



It will be useful to raise the recent case of *Benson v IC and the Governing Body of Buckinghamshire New University* (28 September 2011, EA/2011/0016) in which the IT considered a case involving aggregated requests.

In this case, the Tribunal challenged our view that the wording ("*relate, to any extent, to the same or similar information*") means that requests can be aggregated where they have a "*an overarching theme or common thread running between them, in terms of the nature of the information that had been requested.*" They said at § 29 that the concept of overarching theme or common thread was not in the legislation. The Tribunal did not say that they objected to the concept because it was too wide (even though they disagreed with us on whether the requests could be aggregated); rather their objection seems to have been simply that it was not implicit in the wording of the legislation and there was no other authority for it. The concept of overarching theme/ common thread could be seen as a way of restricting the potentially very wide application of the wording in reg 5(2) and hence of making it slightly more difficult to aggregate requests. Rejecting the concept could conceivably allow authorities more scope for aggregating requests. However, whilst this Tribunal did not accept our interpretation, it also did not clarify what its understanding of 'same or similar' was, and accordingly its finding is of limited use in interpreting reg 5(2).

The important point to note therefore is that delegates need to refer to the specific test as set out in the Fees Regulations and explain that concepts such as overarching theme are just the means by which it can be discussed.

## Aggregation

- The third condition in regulation 5 of the Fees states that the *"requests should be received within any period of 60 consecutive working days"*
- Fees Regulations are silent on how to reconcile the ability to aggregate requests within "any period of sixty consecutive days" with the obligation under section 10 to respond to requests within twenty working days.
- The Commissioner's Approach:
  - Up to 20 days 'forward'
  - Up to 60 days 'back'
  - Any combination of the two provided the total period does not exceed 60 days from the date of the request being refused on the basis of the aggregated costs of compliance

## Question

A Council receives the following requests from a husband ("H") and wife ("W"):

(1) 25 November (W) – "please supply all documents from 2011 which relate to borough anti-bullying procedures and policies"

(2) 4 December (W) – "How much money was spent on the 2011 staff satisfaction survey?"

(3) 5 December (H) – "How many days have borough staff been absent through stress in 2011".

Can the public authority claim section 12 in respect of the 5 December request on the basis that it would exceed the costs limit to deal with all three requests?

Would your answer be different if the first request was received on 15 August?

**ico.**  
Information Commissioner's Office

Are the requests from the same person or a group who appear to the public authority to be acting in concert?

In this case – the requestors are husband and wife; the PA has confirmed that the couple live at the same address and can refer to previous correspondence and requests where the couple have acted together and so it is likely to appear to the PA that the couple are acting in concert and therefore that this limb of the test is met.

(b) Do the requests relate, to any extent, to the same or similar information?

Regarding the substance of the requests – the first request relates to anti-bullying procedures, the second relates to the staff satisfaction survey and the third is concerned with staff absences through stress. It could be said that the common theme between these requests is staff satisfaction at work and information related to whether or not existing policies are assisting with staff satisfaction, the management of stress, avoiding stressors such as bullying etc. To this extent, they could be said to relate to the same or similar information. It may also go to strengthen the argument that the requests are seeking the same or similar information that all three are seeking information about 2011 and also that the first and third requests both use the same word – "borough". In conclusion, it is likely that it can be said that these request all relate, to any extent, to the same or similar information.

(c) All three requests were received within a few days on each other so they meet the 60 consecutive working days test.

If the first request was received on 15 August, then all three requests could not be aggregated as this request was received outside the 60 working day period.

## Short break



**ico.**

## Case study

### **Example to work through:**

Transport for London (FS50385216, 12 September 2011)

See hand-out

## Section 12 & section 16

- Duty to provide advice and assistance where it would be reasonable to do so.
- Paragraph 14 of the section 45 Code of Practice:

*A public authority "... should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."*

## Section 12 & section 16 (cont'd)

- Indicate that no information can be provided within the appropriate limit
- Indicate what information can be provided within the appropriate limit
- Provide advice and assistance to refine the request

**ico.**

- (a) This is based on a plain English interpretation of the phrase "*...what, if any, information could be provided...*"
- (b) It is likely that if a public authority provides a breakdown, it will be indicating what information can be provided within the limit i.e. a PA provides an estimate of £5,050 to locate, retrieve and extract some information. This is broken down into (i) £50 on one employee checking the electronic records for 2 hours and (ii) one employee checking the older information which is held on 400 paper files @ one file reviewed in 30 minutes. This shows the complainant that s/he could receive all of the information held electronically within the appropriate limit and some of the manual information. However, the public authority should not just decide to release the electronic information. Instead, they should provide the breakdown to the complainant and let him/her decide where the limited resources should be directed i.e. s/he may only be interested in the older records which are held in paper files even though s/he may receive less information than can be provided from an electronic search.
- (c) What is reasonable in terms of providing advice and assistance to the complainant so that s/he may refine the request will depend on the circumstances of the case except that delegates need to be alert to the point that it is the complainant and not the public authority who should decide where the limited resources are spent even if it seems obvious to the public authority that the complainant would receive the most information via i.e. one particular format or only looking at certain files.

It would be helpful to advise delegates that should they want further detail and examples of section 16; then they should refer to the s12 advanced training workbook.

## Question

A Council applies section 12 to a request for all information on the Council's equality and diversity policy from inception to date. It provides the following by way of advice and assistance:

*'...The information for 2002 to June 2009 is held amongst our archived HR paper files. Files are stored in date order and we estimate that we could search through, on average, five files per hour. There are approximately 20-25 files for each year although we had a change of policy on E&D in May 2008 so you may be interested in information from that time. We estimate that we can locate, retrieve and extract the electronic information from July 2009 to date in about 6 hours. Please let me know which information you would like under the 18 hours costs limit.'*

Is this adequate advice and assistance for section 16 purposes?

**ico.**  
Information Commissioner's Office

On the face of it, the public authority has provided a breakdown of its estimate and it has also explained how its records are stored and what information can be provided under the costs limit whilst leaving the decision as to what information is actually provided up to the requestor. It has also suggested that the requestor may be particularly interested in the records dated around May 2008 but again it has left the choice with the requestor as to whether this is the information s/he wants.

However, the requestor is still left somewhat in the dark as to what paper information he could receive under the costs limit, for example, the requestor does not know how many paper files could be obtained under the costs limit.

Therefore, whilst on the face of it, the above would seem to be helpful, it actually is a bit vague and requires the complainant to carry out some calculations.

This A&A is ok but it could be better and still leaves some uncertainty which means the complainant needs to seek further clarification.



## And now....

- Section 12 advanced training workbook for practical questions and exercises
- Any questions?



**ico.**  
International Council of Organizations

**Name of Course:**

FOI - Advanced training on section 12 (costs)

**Objective:**

By the end of this session delegates should:

- Understand what is meant by the appropriate limit and what constitutes a reasonable estimate;
- Be able to evaluate and challenge the case put forward by a public authority for applying section 12(1);
- Understand when it is possible to aggregate the costs of complying with more than one request;
- Understand how the duty to provide advice and assistance applies in section 12 cases;
- Be able to evaluate whether a public authority has met its duty to provide advice and assistance in section 12 cases.

**The training is suitable for:**

Existing ICO staff who have limited experience of applying section 12 on a day to day basis.

**Timing of delivery:**

Ideally, this training should be provided when the delegate begins to apply section 12 in practice as part of their core duties.

**Pre-course requirements:**

It is assumed that delegates will have completed the portion of the foundation training workbook which covers section 12, or have an equivalent level of knowledge.

**Post-course requirements:**

Delegates should work through the advanced training workbook on section 12 to strengthen and consolidate their understanding. This will need to be done with a mentor who will be allocated by your line manager.

## Course outline:

The course content is as follows:

- The basics of section 12 to include setting out the appropriate limit for different public authorities; which activities can be taken into account in deciding whether the appropriate limit is exceeded and what the term "estimate" means in practice.
- Aggregation of multiple requests.
- Section 16 in relation to section 12.

The presentation aims to give delegates a practical understanding of section 12 through the use of questions and a case-study.

## References

The following cases will be referred to in the presentation:

- *The Chief Constable of South Yorkshire Police v the Information Commissioner* (EA/2009/0029, 14 December 2009)
- *The Chief Constable of South Yorkshire Police v the Information Commissioner* [2011] EWHC44 (Admin)
- *Urmenyi v the Information Commissioner and the London Borough of Sutton* (EA/2006/0093, 13 July 2007)
- *Randall v the Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004, 30 October 2007)
- *Benson v the Information Commissioner and the Governing Body of Buckinghamshire New University* (28 September 2011, EA/2011/0016)
- *Transport for London* (FS50385216, 12 September 2011)
- *DEFRA v the Information Commissioner and Simon Burkett* [2011] UKUT 39 (AAC) and *Home Office v the Information Commissioner* [2011] UKUT 17 (AAC)
- *All Party Parliamentary Group on Extraordinary Rendition v the Information Commissioner and the Ministry of Defence* [2011] UKUT 153 (AAC)

## Case-Study

### Transport for London (FS50385216, 12 September 2011)

One requestor submitted the following request to Transport for London ("TfL") on 16 December 2010 for the following information:

*"Strikes resulted in disruptions to services on London Underground on four recent dates; September 6th, October 3rd, November 2nd, and November 28th 2010.*

*Under the Freedom of Information Act 2000, please could you advise me for each date separately; how many stations were closed (either for part or the whole of the strike day)?*

*And how many stations were left unstaffed but open (either for part or the whole of the strike day)?*

*Please name and list the affected stations per Line sequentially (i.e. as a train would pass through from one end to the other) for each date."*

TfL provided the complainant with a spreadsheet with six tabs showing the stations that were closed for all or part of the day on 6 September, 3 October and 2, 3, 28 and 29 November.

In relation to the second part of the request, TfL explained that it was unable to provide details of which stations were left unstaffed for either part or the whole of the strike day as it would exceed the costs limit under section 12 to do so. TfL supported its claim that section 12 was engaged with the following explanation:

*"The information requested is not held centrally and is only contained in the manual weekly reports. In order to provide these details, we would need to check the individual station records for the days that your request covers. This would require us to retrieve the records for each station and extract the details of when the station was closed or unstaffed due to the strike action."* (Taken from paragraph 4 of the decision notice)

The complainant complained to the Commissioner about the application of section 12 to the second request.

**Q1**

**What is the appropriate limit for TfL?**

**Q2**

**What sort of questions need to be put to TfL at this stage to enable you to consider the reasonableness of the estimate?**

In response to the Commissioner's questions, TfL explained that the information about staffing levels at stations is not held electronically.

TfL clarified that it had already provided the complainant with details of which stations were open and which stations were closed.

It went on to say that in order to provide details of which stations, if any, were open but unstaffed on the relevant days, it would need to retrieve this information from the station log books and use the log books to determine for each station whether there were unstaffed periods for each of the four days covered by the request.

TfL indicated that it had not carried out a sampling exercise in response to this particular request. Instead, it relied on the timings provided by London Underground's customer relations team who have significant experience of retrieving these logbooks and extracting information as part of their work in dealing with personal injury claims following incidents on the London Underground network.

**Q3**

**Is it reasonable for TfL to rely on timings provided by the London Underground's customer relations team rather than conducting its own searches or a sampling exercise in relation to this specific request?**

TfL explained that there are over 260 stations which are split into 37 station groups and that it had based its estimate on retrieving the information from the station groups. TfL provided the following estimate:

- Obtain the log book for one station group = 2 hours

- Examine the log book, identify the dates in question, check for times when the station was unstaffed and record that information for collation into a single response = 2 hours
- 4 hours x 37 station groups = 148 hours

#### **Q4**

**Has TfL based its estimate solely on the activities as permitted by regulation 4(3) of the Fees Regulations?**

TfL went onto say that as the request covers four separate strike days over a three month period, then there may be more than one log book per station from which to retrieve, locate and extract the information.

TfL accepted that whilst it may not need to obtain some of the individual log books, for example if a particular station was closed for the whole day for any of the four days in question, this would not sufficiently reduce the time implications because:

*"...during the September strike more than a third of services operated. We continued to plan for the further strikes that were announced whilst continuing mediation with the unions involved. During the October strike most stations in central London remained open. All key transport hubs operated including Liverpool Street, London Bridge, Victoria, Euston, Stratford, Waterloo, Holborn, Heathrow, Kings Cross, Finsbury Park, Paddington, Earl's Court and Whitechapel. Trains ran on ten of the eleven lines, and 40 per cent of services operated. Further planning for the November strikes meant that three quarters of stations were open at key parts of the day. Up to 40 per cent of trains ran during evening peak and Oyster data showed that the Tube carried half the usual number of passengers. I can also confirm that services ran on ten of the eleven lines."*

Therefore, as a number of stations may have been open for part of the day, TfL would still have to review the log book to determine if it was unstaffed for any of the time that it was open.

#### **Q5**

**Do you think TfL's estimate is reasonable and if so, why?**

## **Answers**

### **Q1**

As TfL is not a central government department, legislative body or a part of the armed forces, then the appropriate limit is £450.

### **Q2**

TfL needs to be asked to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request which should include a description of the nature of the work involved and whether these activities fall within the permitted activities as set out in regulation 4(3) of the Fees Regulations e.g.

- how long would it take to retrieve the individual station records;
- how many station records are relevant,
- how long would it take to look through one station record and why would it take this long i.e. how is the requested information recorded etc

TfL could also be asked whether it has carried out any sample searches or whether a sampling exercise has been undertaken in order to determine this estimate.

TfL could also be asked whether there are any alternative ways of retrieving and extracting the requested information.

TfL should also be asked to clarify whether the requested information is held electronically.

### **Q3**

In this case, it would seem reasonable to rely on the timings provided by the London Underground customer relations team given that they have significant experience of dealing with the retrieval of the logbooks which are the key part of this request.

It is useful to point out to the delegates, that it will not always be the case that we will accept a public authority's reliance on another party's estimate of the relevant timings as different factors may be in play which would mean that it would not be appropriate to rely on information from a third party.

The same is true of scenarios where a public authority relies on estimates in previous decision notices. In such cases, delegates

need to be careful to ensure that the scope of the request and the extent of the records and timings involved are the same before using this as a basis for accepting previous arguments in support of a new application of section 12.

#### **Q4**

Regulation 4(3) sets out the four activities which can be taken into account when producing an estimate as follows:

- (a) determining whether it holds the information;
- (b) locating the information, or a document containing it;
- (c) retrieving the information, or a document containing it;  
and
- (d) extracting the information from a document containing it.

TfL has not included any time for the determining whether it holds the requested information or locating it. Instead, the estimate is made up of the time it would take to retrieve and extract the requested information. It does not appear that TfL has taken any other activities into account and therefore it would appear that the public authority has correctly based its estimate solely on the activities permitted under regulation 4(3) of the Fees Regulations.

#### **Q5**

TfL has confirmed that it does not hold this information electronically and therefore it would not be possible to conduct a quicker search via electronic means.

It would not appear that there is a quicker way in which to retrieve and extract the requested information and therefore it depends whether the estimate in relation to searching manual records is reasonable.

The first point to note is that in the absence of any argument or evidence to the contrary, the Commissioner is likely to just accept TfL's claim that there are 37 station groups.

The second point to consider is whether the Commissioner is satisfied that it would take 2 hours to retrieve the log book for one station group and a further two hours to extract the relevant information from that log book. If the Commissioner is satisfied with these timings, then it is likely that the estimate is reasonable and that section 12 is engaged.



### **Case-Study**

#### **Transport for London (FS50385216, 12 September 2011)**

Additional Questions for Case-Study example – not used in Training

#### **Q3**

**Suppose the requestor claims that TfL has a legal obligation under health and safety law to collate details of when stations are open but unstaffed. The requestor therefore argues that this information should be easily and quickly retrievable by means other than checking the log books.**

**How should you respond to the requestor?**

#### **Q3**

Firstly, the Commissioner's position is that a public authority does not have to consider every possible means of obtaining the requested information in order to produce a reasonable estimate. However, an estimate is unlikely to be reasonable where the public authority has failed to consider an absolutely obvious and quick means of locating, retrieving and extracting the information.

The Commissioner bases this approach on the Tribunal's comments in the case of Alasdair Roberts case (EA/2008/0050, 4 December 2008) where the complainant offered a number of suggestions as to how the requested information could be extracted from the database. The Tribunal said at paragraphs 15 and 13:

*"...the complainant set the test at too high a level in requiring the public authority to consider all reasonable methods of extracting data;*

*"...it is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack. And in those circumstances it would not matter whether the public authority already knew of the alternative or had it drawn to its attention by the requestor or any other third party..."*

Therefore, it would be appropriate to ask TfL whether or not it does have a legal obligation to collate the requested information. If so, then its estimate based on retrieving and extracting the information from the log books may be unreasonable on the basis that it has

failed to consider an absolutely obvious and quicker alternative means of providing the information. However, if it is not required to collate this information either under a legal obligation or for other business purposes, then the issue remains whether the existing estimate is reasonable.

**Q4**

**In this case, the requested information is not held in electronically but in other cases where the information is held electronically, what sort of general questions should be asked to ensure that the public authority has utilised a reasonable strategy in searching its electronic records?**

**Q4**

It may be useful to ask the following general questions where information is held electronically:

- How is the electronic information stored i.e. on an Excel spreadsheet, a case management system, a bespoke records management system?
- Is the requested information held in more than one electronic system?
- How can the electronic information be searched or interrogated?
- Is there any limit on the number of search results which can be returned, for example, is the system limited to finding the first 100 most relevant records or is the search tool limited to 5,000 records etc?
- What search terms or key words did the public authority use when carrying out its searches?

For example, if the Department of Health is asked for all information on the reforms to the NHS, it is unlikely that a reasonable estimate will be produced if the authority had just searched using the term "reforms" as this is likely to return thousands of results and it would take further time to decide which results were relevant to the request. However, the authority is more likely to produce a reasonable estimate where multiple and more specific search terms have been used, for example, "health and social care reforms", "health

and social care bill", "commissioning", "GP commissioning" etc.

- Can the public authority run a report which will extract the requested information specifically or will it require searching for various items in order to collate the requested information?
- Can a public authority purchase a bespoke product which would allow their systems to be interrogated to locate, retrieve and extract the requested information?
- What records management policies are in place at the public authority, for example, are emails automatically deleted after 3 months or for example is electronic information only held for three years from the date of the file closure?
- Has the requested information always been held electronically or were the records held manually and then transferred into electronic files at some point?

Of course, more specific questions will need to be based on the circumstances of the actual case.

#### **Q8**

**Instead of providing the estimate referred to above, suppose TfL's FOI Officer says:**

***"I looked at a fairly similar request a while ago and based on that experience, I would say that it would take about three weeks (one person working seven hours a day) to retrieve the log books from the 37 station group and extract the relevant information. As this obviously exceeds the costs limit, I am not able to deal with this request".***

**Would you say this is a reasonable estimate and if so, why?**

#### **Q8**

If TfL provided this response, it would be difficult to conclude that the estimate is reasonable because it fails to explain how the estimate has been calculated and why it is "realistic and sensible". Also, in this example, TfL has given no "cogent evidence" to explain how it can rely on a previous 'similar' request i.e. in what ways was it similar to the scope of the current request and the nature of the information requested.

Without such details, the Commissioner would probably conclude that the estimate was unreasonable and that section 12 is not engaged.

This is so even though the estimates are similar in both examples (i.e. in the actual response it was 148 hours and in the hypothetical response, it was said that it would take about 3 weeks – 7 working hours per day x 21 days = 147 hours).

This position was recently confirmed by the Information Tribunal in the case of Cardiff Council and Christopher Hastings (23 February 2012, EA/2011/0215) in which the Council did not provide a breakdown of the work required under each of the four activities permitted under the Fees Regulations and instead relied on a

*"...bald assertion that the work required would 'obviously' take longer than 18 hours. Mr Parsons [for the Council] based this assertion in large part upon the time it had taken him and his colleagues to deal with a related enquiry from Mr Hastings that had been addressed in 2008. The work in relation to this matter however was described in the most general terms ('it took three weeks') and the Tribunal was not provided with any analysis or breakdown" (paragraph 25).*

This led the Tribunal to conclude that the Council had failed to adduce 'cogent evidence' and had failed to demonstrate that they had undertaken a process of investigation followed by assessment and calculation (paragraph 27) and accordingly, section 12 was not engaged.

**Staff training**

# Making the connection between learning and work

## FOI advanced training workbook on section 12



**ico.**

Information Commissioner's Office

## Contents

1. Introduction
2. Aims and objectives for this workbook
3. The basics of section 12 (Q1 & 2)
4. A reasonable estimate (Q3 – 7 & five 'test yourself' questions)
5. The basics of aggregation (Q8 – 11)
6. Advice and assistance (Q12)

Exercises 1 & 2

Appendix: suggested answers to questions and exercises

## **1 Introduction**

For basic training on section 12, readers should refer to the FOI and EIR foundation training workbook.

This advanced workbook is intended to provide further and more detailed information on the application of section 12 with the use of practical examples.

Before working through this workbook, readers are expected to have carefully read through the guidance on section 12.

## **2 Aims / objectives for this workbook**

When you have worked through this workbook, you should be able to:

- Understand what can and cannot be taken into account in calculating an estimate of costs for section 12 purposes;
- Understand how to consider and challenge the arguments put forward by a public authority to enable you to make a decision as to whether or not the estimate is reasonable;
- Understand in what circumstances it is appropriate to aggregate the costs of complying with more than one request;
- Deal with routine questions regarding the application of section 12.

It is important to note that this workbook is not intended to cover all issues which may arise in relation to this provision.

Further, this workbook is not intended to be a complete guide on how to investigate section 12 cases.

## **3 The Basics**

### **3.1 The Legislation**

Section 12(1) of the FOIA is a provision which allows a public authority to refuse to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.

Section 12(2) exempts a public authority from confirming or denying whether it holds the requested information if this activity alone would exceed the appropriate limit.

### **3.2 Key points in applying section 12**

Readers should consider the section 12 guidance for full details but the key points to note are as follows:

- It is up to the public authority to initially decide whether section 12(1) or section 12(2) is engaged.
- A public authority only needs to produce a reasonable estimate rather than a precise calculation of the costs.
- In calculating its estimate, regulation 4(3) of the Fees Regulations state that a public authority can only take into account the costs of:
  - o determining whether it holds the information;
  - o locating the requested information;
  - o retrieving the requested information and
  - o extracting the information.
- A public authority cannot take into account any other activities in calculating its estimate, for example, it cannot include the costs of redacting exempt information; applying exemptions or cross-referencing or checking the information to be disclosed for accuracy.
- The Fees Regulations state that the cost of carrying out the above activities can only be included in the estimate at a flat rate of £25 per hour irrespective of the actual amount incurred in or charged for carrying out the activities.

**Case officer tip:** A number of public authorities use external commercial companies to manage and store their records on an external site. This means that a public authority may seek to include in its estimate the costs of its contractor in (a) locating and retrieving and (b) transporting the requested information from a deep storage facility. In deciding whether such costs can be properly included in an estimate, case-officers may need to see a copy of the contract between the public authority and the contractor to consider its terms of engagement.



For example, if the costs of document retrieval at the storage facility are included in the overall contractual price, then no additional costs are incurred and there is nothing extra to include in the estimate. However, if the company charges an amount for locating each document but retrieves several documents on one trip, the public authority could only include in its estimate those retrieval charges which are specifically attributable to the requested information.

Alternatively, some public authorities have a reciprocal arrangement to share deliveries with neighbouring authorities, and to "piggy back" on their deliveries. For example, if authority A asks its neighbouring authority B to obtain the relevant documents on its scheduled delivery run, and no additional cost is incurred, then authority A cannot include the costs of the travel time taken in its estimate.

Where a public authority incurs additional costs in order to obtain relevant documents urgently, the authority may take account of those additional charges but the exact amount which may be included will depend on the terms of the contract. Also, case officers will need to consider the primary reason for the delivery. If the delivery was required primarily for the FOI-related information, then it is likely to be reasonable to take account of the full cost of the delivery but this is not necessarily so if the information is required primarily for non-FOI purposes.

A public authority may incur additional charges where it sends additional staff to search for the information because of difficulties in identifying the specific information sought or where the request requires the transportation of large quantities of information. Case officers must decide on the particular circumstances of the case whether these additional charges can reasonably be included in the estimate.

**Driver and Vehicle Licensing Agency  
(FS50345802, 2 June 2011)**

The complainant requested a copy of the DVLA vehicles database. In its refusal notice, the DVLA said that it would exceed the appropriate limit to deal with the request because:

*"... Our IT supplier would do the bulk of this work and based on previous work an indicative example*

would take around 3 man days to determine, locate, retrieve and extract the information requested. However, DVLA would be charged £600 per day for that work that would involve writing, testing, scheduling and running the query."

The DVLA upheld its claim of section 12 at the internal review stage and made the following comments:

"....DVLA must apply Regulation 4(4) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 in estimating the costs of determining, locating, retrieving and extracting the information, as it would take more than 24-hours to complete the work.

In any event, DVLA is able to take into account its IT suppliers charge for obtaining the information and costs anywhere between £650 - £1,000 per day to action this request. Therefore taking the whole cost (including third party costs) to comply with your request into consideration would exceed the £600 limit.

It is estimated that the total cost of dealing with your request will cost in excess of £50k.

The time and expense to actually run a scan for the information requested will divert time from core business activities as well as essential public funds to operate DVLA effectively."

**Q1.**

**What points of correction and clarification need to be raised with the DVLA?**

**Magherafelt District Council (FS50344365, 21 December 2010)**

The complainant requested a copy of all correspondence between the Foods Standards Agency and the Council.

The Council estimated that it would cost £1,475 to deal with the request based on the following activities:

- searching 426 relevant files @ 4.8 minutes per file totalling 34 hours @ £25 per hour  
= £850
- searching the email accounts of 8 members of staff which would take 30 minutes per person so 4 hours @ £25 per hour  
= £100
- communicating the information to the complainant  
= £525

**Q2**

**What error has the Council made in calculating its estimate?**

## **4 A Reasonable Estimate**

### **4.1 Key points in deciding what constitutes a reasonable estimate**

Readers should refer to the section 12 guidance which deals with the issue of what constitutes a reasonable estimate in detail.

However, the key points to note are as follows:

- It is likely that a reasonable estimate is one which is "*sensible, realistic and supported by cogent evidence*" (Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007)).
- A realistic estimate is one based on the time it would take to obtain the requested information from the relevant records or files as they existed at the time of the request or up to the date for statutory compliance with the request.
- A public authority is not obligated to search for or compile some of the requested information before providing its

estimate. But, if a public authority does carry out some searches, it is not obliged to search up to the appropriate limit.

- Technically, a public authority only needs to confirm that section 12 is engaged without providing a breakdown or explanation as to how the estimate was calculated.

However, it should provide such a breakdown as a matter of good practice. A breakdown also goes to support the reasonableness of the estimate.

A breakdown may include details of the public authority's search strategy; the reasons it needs to search the files or records it has referred to; details of how the requested information is stored and a calculation of how long it would take to obtain the requested information.

**Case officer tip:** It is up to the public authority to initially estimate whether it would exceed the costs limit to comply with a request although any estimate must be reasonable. However, if a complaint is made to the Commissioner, he can investigate and challenge the public authority's process of investigation, assessment and calculation which led to their estimation that it would exceed the appropriate limit to comply with the request. The Tribunal has also said that the Commissioner can:

*"... enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority.*

*The Commission[er] and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account.*

*Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4(3) a-d must be reasonable".*

Paragraph 16 of Mr William Urmenyi & the London Borough of Sutton (EA/2006/0093, 13 July 2007)

**Greater Manchester Police (FS50279125, 20 May 2010)**

The complainant made several requests for specific information in relation to a murder investigation undertaken between 1992 and 1995.

GMP claimed that it would exceed the appropriate limit to comply with the request but it did not provide any further detail. When questioned by the complainant, GMP responded to say that section 12 was engaged because the requested information was not in an "*easily retrievable format*".

GMP later explained that the information may be held within 26 boxes, one leather briefcase and a file all stored in the archive at Oldham District HQ but that it would exceed the costs limit to look through these resources to ascertain whether it did hold the requested information.

**Q3**

**To be satisfied that it is reasonable to estimate that it would exceed the appropriate limit to confirm whether or not the requested information is held; what questions should now be put to GMP?**

**Norwich City Council (FS50368062, 17 October 2011)**

The complainant requested information regarding the award of a contract to Connaught Plc and/or its subsidiaries.

The Council claimed section 12 and, despite further questioning from the Commissioner, relied on the following information in support of its claim:

- the request was very wide-ranging and relevant documentation was not held in one location or in one particular filing system;

- it would be necessary to liaise with several Council officers who would have to search through all the documentation they held;
- it provided an estimate of between 1 and 4 hours for each relevant individual to search through documents in their possession.

**Q4**

**Is the Council's use of section 12 "sensible, realistic and supported by cogent evidence"?**

**The Home Office (FS50256879, 3 December 2009)**

The complainant made 12 requests for information relating to fraud in landed property.

The Home Office explained that the requested information was not specifically collated and that the only way it could establish whether or not it held the requested information would be to check each case file held by the relevant department, namely, the Judicial Co-Operation Unit (JCU).

The Home Office said that the JCU receives approximately 253 case files a month. All files have a generic title format which does not cite the type of alleged criminal activity. Accordingly, the Home Office argued that it would take approximately 30 minutes to examine the contents of each file to establish whether or not it related to landed property fraud.

30 minutes x 253 cases = 126 hours to find the relevant information for one month.

The Home Office advised that the JCU did have an electronic database for casework monitoring, statistics etc and although this could be used to identify all files having 'fraud' as the offence; there was no facility for sub-division of the fraud category. Accordingly, the associated paper files would then have to be examined to establish what sort of fraud was alleged.



**Q5**

How should the ICO deal with the following hypothetical arguments if they were put forward by the complainant?

**(a)**

The complainant says that the Home Office has "grossly inflated" the figure of monthly cases received just to avoid dealing with his request although he is unable to provide any evidence or documents to support his claim.

**(b)**

The complainant used to work for the Home Office and says that he would estimate that the figure is nearer 100 cases per month. This is because he knew that five people worked in that Unit and that they were allocated approximately 20 new cases on a monthly basis.

**Q6**

The estimate is based on 30 minutes per file but the complainant argues that it would only take a few minutes per file to see whether it related to landed property fraud. The complainant asks the ICO to consider this.

How could you investigate whether 30 minutes was a reasonable estimate for carrying out this activity?

**Q7**

The complainant argued that as the electronic search would reveal which of the paper files related to the general category of fraud, the Home Office would only need to search a much reduced number of files to see which of the general fraud files fell within the scope of the request.

The Home Office argued that even if the database was used in this way, the large

**number of files which would need to be searched would still mean that complying with the request would exceed the costs limit.**

**Does this have any effect on the reasonableness of the estimate?**

### **Test yourself**

1. What is the appropriate limit for the Ministry of Defence?
2. Does a public authority have to consider all reasonable means of locating, retrieving and extracting the requested information in order to produce a reasonable estimate?
3. Is it a valid estimate where the public authority has already searched beyond the appropriate limit before claiming section 12?
4. Can a public authority include in its estimate the time it would take to remove any exempt information from the information to be disclosed?
5. A public authority is charged £125 by its external storage company for retrieving some of the requested information from deep storage. Can this cost be included in the estimate?

## **5 The Basics of Aggregation**

### **5.1 Conditions for aggregating requests**

Regulation 5 of the Fees Regulations sets out the three conditions required in order to aggregate one or more requests:-

- (i) The requests ask for the same or similar information (it only needs to be the same or similar "to any extent")
- (ii) The requests need to be from one person or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign
- (iii) The requests should all be received within 60 consecutive working days.



**Case officer tip** Where a public authority has claimed that it would exceed the appropriate limit to deal with just one of the requests which it is seeking to aggregate, then case officers do not have to consider whether estimates have been provided for the other requests or if estimates have been provided, the reasonableness of those other estimates.

For example, a public authority aggregates three requests and states that as it would cost £2,900 to deal with the first request, it is not obliged to deal with all three requests and it does not provide estimates in relation to the costs of dealing with the second and third requests. In this case, the case officer may find that section 12 is engaged if s/he decides that the public authority's estimate in relation to the first request only is reasonable.

Similarly, a public authority may claim that it would cost £2,900 to deal with the first request, £75 to deal with the second and £400 for the third request. If the case officer accepts that the estimate in relation to the first request is reasonable, then s/he does not have to consider the reasonableness of the estimates provided for requests two and three.

However, for completeness, case officers should also read point 6.3 below.

## 5.2 Multiple requests in one letter are separate requests

It should be noted that, technically, multiple requests within a single item of correspondence are separate requests for the purpose of section 12. As such, it cannot be assumed that all requests in one letter are necessarily seeking the same or similar information and instead each request needs to be considered for aggregation purposes individually.

**Case officer tip:** Case officers may want to include the following standard paragraph in decision notices involving multiple requests within a single piece of correspondence:

*"The Commissioner notes that in this case the complainant has made more than one request within a single item of correspondence. Section 12(4) provides that, in certain circumstances set out in the Statutory Instrument 2004 No. 3244 'The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004' ('the Fees Regulations'), requests can be aggregated so that the estimated cost of complying with any of*

*the requests is to be taken to be the estimated total cost of complying with all of them. Regulation 5 of the Fees Regulations sets out the relevant condition in this case and provides that multiple requests can be aggregated in circumstances where the two or more requests relate to any extent, to the same or similar information. Although this test is very broad, it is possible that one or more requests may not meet this test and the Commissioner has therefore considered whether he is satisfied that the requests relate to the same or similar information".*

The decision notice should then go on to conclude either that the Commissioner is satisfied that the requests do relate to the same or similar information and can therefore be aggregated or explain why the Commissioner is not satisfied that all the requests relate to the same or similar information.

### **Example**

A Council receives the following requests via email from the same individual:

9 March @ 15:37

*"Please let me know the total amount spent on salaries for all staff in the legal dept. in 2010."*

22 March @ 09:13

*"I'm concerned about any possible increase to the fee for renewing a Blue Badge parking permit. Under the FOIA, I ask to be provided with any information, to include meeting minutes, emails, etc where a possible increase is discussed or mentioned."*

22 March @ 18:01

*"How many Penalty Charge Notices (parking tickets) were issued in 2010 in the town centre?"*

The Council aggregated these requests and applied section 12. The Council stated that it could aggregate these requests because it was aware from its previous dealings with this individual that they all related to his campaign to change Council policy to make it free to park in the town centre. Accordingly, the requests were all for the same or similar information.

**Q8**

**Can these requests be said to be seeking "to any extent, the same or similar information"?**

**City of Westminster Council (FS50197355, 27 July 2009)**

The requestor made a multiple-part request on 22 December 2007 for information relating to Pimlico School. The Council sought to aggregate these requests with 11 other requests which the Council argued were all from people trying to overturn a decision to make Pimlico School into an academy.

The Council stated that *"...a number of parents within the Pimlico Support Association created a group on Google Groups on which they discussed a number of areas including the use and responses of FOI requests to obtain information regarding Pimlico School and its performance to aid their campaign in overturning the decision to have Pimlico School made an academy."*

The Council provided copies of the screenshots from the Google Groups discussion board.

The requestor says that she is not acting as part of a campaign and that there has been no orchestration of FOI requests.

**Q9**

**Can all these requests be said to be from the same person or a group acting in concert?**

**Example**

A government department receives multiple requests within a single piece of correspondence from the same complainant. All the requests seek the same or similar information.

**Request 1**

The authority spent 4 hours searching for the information in order to answer this request and discloses this information to the requestor.

**Request 2**

The authority estimated that the cost of compliance with this request would be £605 and so it claimed section 12 in relation to this request alone.

**Request 3**

The authority applied section 43 to all the information which fell within the scope of this request.

The public authority upheld the above in its internal review. The complainant complained to the Commissioner about the application of sections 12 and 43.

**Q10**

**In this case, the public authority has deliberately or inadvertently refrained from aggregating all three requests even though it was open to it to do so.**

**How should the Commissioner investigate the application of section 12 in this case?**

### **5.3 Reconciling the Fees Regulations with section 10 of the Act**

The Fees Regulations state that all requests which a public authority wishes to aggregate should be received within a period of 60 consecutive working days.

However, the Fees Regulations do not explain how this 60 day period is to be reconciled with a public authority's obligation under section 10 to respond to any request within 20 working days.

The section 12 guidance sets out the Commissioner's position on this issue but in short his approach is that the aggregation period can run up to 20 days 'forward' from the date of any single request or 60 days 'back' from the date of the request but the total aggregation period must not exceed 60 consecutive working days.

### **Example**

A public authority receives the following requests from the same requestor on the same subject matter:

Request 1 on 19 October

The public authority starts to deal with this request at the end of October but before providing a response; it receives the following further requests:

29 October	- Requests 3 - 9
10 November	- Requests 10 - 15
22 November	- Requests 16 - 37

The public authority claims that the costs of dealing with all 37 requests would exceed the appropriate limit and so it was not obliged to comply with any of the requests under section 12.

### **Q11**

**Which requests can the public authority aggregate?**

## **5.4 No aggregation of costs for original and refined requests**

It is important to note that where a public authority applies section 12 to a request, it is likely to be required to provide advice and assistance to the requestor to enable him/her to submit a refined request which can be complied with under the appropriate limit (see below).

However, it should be noted that a public authority should not aggregate the costs of dealing with the original and the refined/new request. Unfortunately, neither the Act nor the Fees Regulations refer to this scenario or specifically prohibit this type of aggregation but as it would frustrate the purposes behind sections 12 and 16, the ICO takes the view that this type of aggregation should not be permitted.

## **6 Advice and Assistance**

### **6.1 Section 16 & the section 45 Code of Practice**

Where a public authority claims section 12, it is not obliged to comply with the request and instead it is only technically required to provide a refusal notice stating the fact of its reliance on section 12.

However, this does not mean the end of the public authority's obligations in respect of this request. Instead, the public authority needs to consider whether it can provide reasonable advice and assistance to the requestor to allow him or her to refine the request so that it can be dealt with under the appropriate limit. This is required by section 16(1). Section 16(2) also states that where a public authority complies with the section 45 Code of Practice, then it will be taken to have complied with its obligations to provide advice and assistance under section 16.

### **6.2 Requestor to choose where limited resources are directed**

An important point to note is that public authorities and the ICO should not make assumptions about which elements of a request are more important to the requestor. Instead, the choice of where to direct the limited resources should always be made by the requestor.

### **6.3 Advice and assistance in relation to aggregated requests**

A public authority may claim that it would exceed the appropriate limit to deal with the costs of multiple requests on the basis that it would exceed the costs limit to just deal with one of the requests to be aggregated. This may be sufficient for section 12 purposes but the public authority should provide details of the costs of complying with each request as part of its advice and assistance obligations under section 16. This is also important as it promotes the point made at 6.2.

### **6.4 Further Guidance**

The reader is referred to the guidance on section 12 for more detail on advice and assistance.

**City of York Council (FS50238411, 5 October 2009)**

The complainant asked for the number of employees who had been absent from work due to stress, anxiety or depression between certain dates as well as the number of complaints of bullying, the number of claims of constructive dismissal and the



number of claims files at the Employment Tribunal for bullying/harassment in the same period.

The Council claimed it would exceed the appropriate limit to comply with these requests as it would have to check in excess of 9,000 staff files which would take in excess of 150 hours to complete. In its internal review and in relation to its advice and assistance obligations, the Council said:

*"You refer to the council's duty to provide advice and assistance. By far the most applicable provision of the "Section 45" Code of Practice is paragraph 14, which describes identifying alternative information that could be provided within the cost limit.*

*It is possible we could choose a subset of files, of 1,000 or fewer, which could be reviewed and the number of bullying cases counted. However without applying specialist statistical knowledge, not readily available internally, the council could not identify a sample which was statistically valid, nor calculate the degree of confidence applicable to it.*

*Further, the information in the files would not necessarily identify relevant cases with words such as "bullying" or "harassment". So whoever inspects the files would need to apply a degree of knowledge and skill, and care. The task would amount to creating information not already held. This work would be outside the obligations of the Act".*

The complainant asked the Council to examine 1,000 files, starting at "A" and stopping once they reached the 1,000<sup>th</sup> employee.

The Council explained to the Commissioner that it had offered the following by way of advice and assistance:

*"...Since the correspondence with [the complainant], a staff survey has been completed. Relevant pages of a PowerPoint summary of the*

*results were provided to her, dealing with two of the survey questions:*

*Are you being bullied or harassed in your work at present? (Yes/No)*

*Who is the bully or harasser? (various categories)*

*The results were expressed as percentages, and the overall survey response rate was 37% of staff excluding teachers. The total value can be extrapolated from other data in the presentation slides. Teachers are a significant group of employees, and also positive respondents may feel bullied or harassed but not enough to complain, so the actual incidence that [the complainant] wants cannot be deduced reliably. Nevertheless this should give a reader a reasonable view of this problem within the council, especially as it is given a historic context. It is the mechanism the council uses for assessing the problem.*

*[The complainant] believes the council offered a different alternative, that of reviewing 1,000 files which at one minute each would need less than 18 hours. This is not so. My remark was that this "could be done, but would be meaningless". There is no ambiguity here. It was not an offer but a refusal to do so. Anyway the survey results are (the council believes) a real and meaningful alternative giving a valid view of the problem, which the other suggestion would not be. Therefore the council believes it has fulfilled its duty of advice and assistance."*

**Q12**

**Do you think the Council has provided reasonable advice and assistance in this case?**



The following exercises are aimed at consolidating most of the issues around section 12 into one real-life case-study and secondly, questions which may be asked of anyone dealing with section 12, for example, staff in Complaints, Internal Compliance or Strategic Liaison.

### **Exercise 1**

(Financial Services Authority (FSA) – 8 July 2009, FS50198530)

#### **Background**

In October 2007 the Chief Executive of the FSA asked the FSA's director of internal audit to carry out a lessons learned review of the FSA's supervision of Northern Rock plc during the period 1 January 2005 to 9 August 2007.

In March 2008 the FSA published the executive summary of the internal report as a result of the review, along with key sections of the report itself, including the Terms of Reference and 'Recommendations and Actions' section.

In April 2008 the FSA published a full version of the internal audit report with redactions made to protect commercial and individual confidentiality.

The four individuals named in requests 2 to 9 held the following positions at the FSA during the period covered by the complainant's requests:

Sir Callum McCarthy – Chairman;  
John Tiner – Chief Executive until July 2007;  
Hector Sants – Chief Executive from July 2007;  
Clive Briault – Managing Director, Retail Markets.

#### **The Requests**

The complainant made a refined request on 3 January 2008 for the following:

- 1. The number of meetings held during 2005, 2006 and 2007 up to August 1 between FSA officials and the directors or management or advisors of Northern Rock plc or its subsidiaries and the dates of those meetings;*

*2. The number of meetings held during 2005, 2006 and 2007 up to August 1 between Sir Callum McCarthy and the directors or management or advisors of Northern Rock plc or its subsidiaries and the dates of those meetings;*

*3. The number of meetings held during 2005, 2006 and 2007 up to August 1 between John Tiner and the directors or management or advisors of Northern Rock plc or its subsidiaries and the dates of those meetings;*

*4. The number of meetings held during 2005, 2006 and 2007 up to August 1 between Hector Sants and the directors or management or advisors of Northern Rock plc or its subsidiaries and the dates of those meetings;*

*5. The number of meetings held during 2005, 2006 and 2007 up to August 1 between Clive Briault and the directors or management or advisors of Northern Rock plc or its subsidiaries and the dates of those meetings;*

*6. The number of internal FSA meetings attended by Sir Callum McCarthy during 2005, 2006, and 2007 up to August 1 at which Northern Rock plc was discussed and the dates of those meetings;*

*7. The number of internal FSA meetings attended by John Tiner during 2005, 2006, and 2007 up to August 1 at which Northern Rock plc was discussed and the dates of those meetings;*

*8. The number of internal FSA meetings attended by Hector Sants during 2005, 2006, and 2007 up to August 1 at which Northern Rock plc was discussed and the dates of those meetings;*

*9. The number of internal FSA meetings attended by Clive Briault during 2005, 2006, and 2007 up to August 1 at which Northern Rock plc was discussed and the dates of those meetings.*

The FSA aggregated all nine requests and claimed that as it would exceed the appropriate limit to deal with the first request; it was not obliged to respond to any of the requests.

The FSA provided the following detail in support of its estimate:

(a) Checking paper files

Material which would be relevant to this request was contained in at least 78 lever arch paper files. The FSA estimated that it would take on average 15 minutes to review each file to locate and extract the relevant information.

15 minutes x 78 files = 19 hours to review all files.

(b) Checking relevant employees' diaries

The FSA explained that the paper files would not give details of any ad hoc or informal meetings or telephone conferences where Northern Rock plc or its subsidiaries may have been discussed.

Therefore, it would need to ascertain which FSA employees, both current and former, worked on the supervision of Northern Rock plc or its subsidiaries during the relevant time period and then conduct a search of their diaries in order to ascertain whether any meetings were held between them and the directors, management or advisors of Northern Rock or its subsidiaries.

The FSA indicated that this would take a considerable amount of time.

(c) Checking the diaries of the individuals named in the request

In addition to the work described above in relation to the first request, the FSA claimed that it would need to review the diaries of the four individuals named in the requests in order to answer requests 2 to 5. The FSA estimated that there were approximately 650 working days in the time period requested and that it would take on average 4 minutes per page to review each calendar page.

4 minutes per page x 650 pages = 43 hours  
43 hours x 4 diaries = 172 hours

In relation to requests 6 to 9, the FSA said that it would need to conduct a search of the relevant diaries as described in relation to requests 2 to 5 in order to determine whether any internal meetings relating to Northern Rock plc or its subsidiaries were scheduled into the diaries.

In addition, it would need to review the 78 files mentioned in relation to request 1 to locate and retrieve any meeting minutes for certain internal meetings (e.g. FSA Board meetings) during the relevant time period to ascertain whether Northern Rock plc or its subsidiaries were discussed and whether any of the four named individuals attended these meetings.

Furthermore, the FSA explained that the 78 files may not contain all the relevant internal meeting minutes or may only contain extracts of such meeting minutes with no mention of the meeting attendees which means that the FSA would need to undertake further searches in order to ascertain whether there were any further meetings attended by these individuals.

(d) Electronic information

The FSA explained that it held a significant amount of information electronically which would also have to be searched.

No estimate provided.

The complainant rejects the public authority's claim that section 12 is engaged. He argues that the information he has requested should be easily retrievable for the following reasons:

- he had refined the time period covered by his request to mirror the period falling within the scope of the Internal Audit Division's investigation;
- the report published in March 2008 refers to a number of meetings held between the FSA and representatives of Northern Rock;
- there is considerable overlap between the scope of the work undertaken by the Internal Audit Division and the scope of his requests.

The FSA acknowledged that although there was considerable overlap between the scope of the work carried out by its Internal Audit team and the information requested by the complainant, the focus of the two was different. The report published following the work carried out by the Internal Audit team included the following terms of reference:

'3. Internal Audit will review the supervisory approach for Northern Rock...In particular it will review whether the FSA's prevailing framework for assessing risk was appropriately applied....

'5....The review team will exclude other areas of supervisory focus unless deemed appropriate by work emerging from the review'.

The FSA noted that the way in which the complainant's requests were constructed meant that its searches would have to be detailed and wide ranging to ensure that all the information the FSA held, regardless of its significance, was located. The FSA acknowledged that although the report does mention a number of visits to Northern Rock and meetings that took place this does not equate to the level of detail the complainant was seeking, i.e. a record of all meetings involving Northern Rock plc and its subsidiaries.

#### **Advice and Assistance**

The FSA said that where section 12 is engaged; it usually offers advice and assistance to help the requestor to refine the request. However, It said that it did not propose to offer any advice and assistance in this case because of the "*large amount of material*" held in relation to these requests and because "*it did not appear possible to refine it further to bring it within the costs limit, and also this request is already in part a refinement of your previous FOI request made in October 2007.*"

**Q1.**

**Set out what issues need to be considered and what questions need to be asked of the FSA in order to assess whether or not its estimate is reasonable.**

**Q2.**

**Consider whether the FSA has met its section 16 obligations.**

## Exercise 2

The following questions are put to an ICO employee at the end of a presentation on FOI issues:

### Question A

*"I dealt with a case recently where I spent about a day trying to find the information in response to the request. I then realised that it would take more than 18 hours to fully comply with the request and so I told the complainant that section 12 was engaged.*

*She said I had to carry on searching up to the costs limit before I could claim section 12. I told her that I don't have to do this but she refuses to let the matter drop so I just want to check with you that I am right?*

*And it would also be helpful if you could refer me to a relevant piece of guidance or even the reference of a relevant decision notice or Tribunal decision which backs me up."*

### Question B

*"I have just taken on the responsibility for dealing with FOI requests for my local Parish Council. I've received a request from someone in the village but the relevant records are still with the previous Council secretary who last week moved 40 miles away.*

*Firstly, can I take into account the time it will take to drive the 80 miles there and back to get the information?*

*And what about the time it takes me to photocopy all the documents at the local library - can I include this time in the estimate?"*

### Question C

*"Am I right in thinking that I don't have to actually start looking for the requested information when I know that it will exceed the costs limit to deal with the request? It seems pointless to have to do any work on a request when the purpose behind section 12 is to allow us to avoid dealing with burdensome requests at all."*

### **Question D**

*"I have received a request for some very specific information from one particular department's archives. Unfortunately, the relevant admin assistant has been on long term sick and files and documents for archiving have just been stacked up in piles near her desk. There is no order or system to the way they have been filed and as time has gone on, some records have been taken out and then just put back anywhere and if a pile of papers falls over, then they are just shuffled back together. I think that given the state of the records, it would take at least a few days to find the relevant information and that section 12 would be engaged.*

*I informed the requestor of this and he sent me an angry email in reply saying that we are in breach of the Act for not organising our records so that the requests can be answered under the costs limit. He was also incensed that all our records are not held electronically in this day and age.*

*How should I respond to him?"*

### **Question E**

*"Hi, I'd be grateful if you clarify something for me – I've received a request which asks for the total number of staff who have been absent due to stress over the past 10 years.*

*The requestor has acknowledged in her email that this might be a mammoth task given that this Department employs over 4,000 people and so she has asked that I work through the personnel files alphabetically until I reach the costs limit. She then says that she will make further requests at 60 plus day intervals to get all the information.*

*I didn't think this was the way that section 12 worked so I'd be obliged if you can let me know whether I have to comply with this or her subsequent requests?"*

### **Question F**

*"Just a quick question – I've got a request and I won't be able to say whether or not we hold the requested information without going through about 6-8 million records and even though it would only*

*take about thirty seconds to check each record; this would obviously exceed the costs limit.*

*I'm about to advise the requestor that section 12 is engaged but I don't think there is any way in which to refine the request to bring it under the costs limit so what should I do now?*

*And if I can't offer any advice and assistance, will it mean that I'm in breach of section 16?*

**How should the ICO employee respond to the above questions?**



## **Appendix**

### **Suggested Answers to Questions and Exercises in section 12 Advanced Training Workbook**

#### **Question 1**

The following points should be put to the DVLA:

- Only a flat rate of £25 per hour can be included in the estimate irrespective of the actual amount charged by the contractor.
- There is no explanation as to how the estimate of £50,000 has been calculated i.e. it doesn't even reflect their calculation of £650 - £1,000 per day for three days work of the contractor.
- The estimate at the internal review (£50,000) is different and significantly higher than the estimate alluded to in the refusal notice (£1,800).
- The argument that the request would divert core funds away from the core business is not relevant to section 12.
- The relevant regulation is regulation 4(3) not 4(4) of the Fees Regulations.

It would be useful to put further questions to DVLA too:

1. The DVLA needs to clarify how it has estimated that it would exceed the appropriate limit to comply with the request. For example, how is the volume of information contained in the database relevant to the estimate of costs? Presumably, the main costs would be incurred when creating the facility to query the database. Once the query was in a position to be applied, would further work be required?
2. The DVLA should be asked to provide a breakdown of its calculation.
3. The DVLA should provide details of any other relevant factors, for example: would any specialist software need to be

purchased in order to comply with this request (the full costs of which could be taken into account)?

## **Question 2**

The Council has erred in including £525 for the costs of communicating the information to the complainant as this is not one of the activities for which it is permitted to include a charge under regulation 4(3) of the Fees Regulations.

## **Question 3**

The following are just suggestions for the types of questions which should be asked of GMP:

- How did the relevant individual locate the source information? If some knowledge or particular search strategy was used to find the boxes, file and briefcase, could that same knowledge or search strategy be used to locate, retrieve or extract the requested information from within those boxes, file and briefcase?
- Has GMP contacted any relevant member of staff who may be able to assist in quickly finding the relevant information i.e. any police officers who were involved in the investigation who are still employed by GMP or any admin staff or archive assistants who may be able to help?
- How much time was taken in locating and retrieving the 26 boxes/one briefcase and one file?
- Are the boxes indexed in any way?
- Are the boxes chronologically organised?
- Are the boxes filed in a way which reflects some sort of order i.e. date order?
- Is there any way of immediately ruling out any of the boxes?
- Is it possible to narrow the search in any other way?

- Are there any electronic means of searching for the same information?
- How long would it take to look through an average box? How many records are in an average box?

#### **Question 4**

It may well be that the Council's estimate is sensible and realistic based on its comments that this is a wide-ranging request; that relevant documents are not all held in one location and that dealing with the request would require liaison with several officers who would have to search through a large amount of documentation.

However, the Council has failed to provide cogent evidence as to why it would take each individual between 1 and 4 hours to search through any relevant documentation, for example, why it would take the Head of Housing Property Services three hours to search through relevant documentation – was this based on a sampling exercise; was this based on an estimate of the time it would take to review x number of files relating to Connaught Plc or was this based on a guess?

The Council also failed to confirm whether its estimate was confined to the four permitted activities listed at regulation 4(3).

In the absence of such detail and a breakdown of how its general estimate was calculated, the Commissioner in this case found that section 12 was not engaged.

#### **Question 5**

##### **Q5(a)**

In the absence of any evidence that the JCU/Home Office has deliberately inflated the number of claims it receives per month, it is likely that we would just accept the information put forward by the public authority at face value.

Depending on other circumstances, a case-officer may nonetheless want to make limited enquiries to verify the figure provided is not unreasonable, for example, checking the JCU/Home Office website to see if these figures are available or checking annual reports or similar for a rough guide as to the general figure. However, our

position generally is that we would accept the detail from the public authority in the absence of reasonable grounds for challenging this.

#### **Q5(b)**

As the complainant has put forward a reasonable ground for claiming that the JCU/Home Office's figure is inflated, then it is likely that this requires further investigation. Accordingly, the complainant's argument should be put to the public authority and their response sought.

#### **Question 6**

The JCU/Home Office could be asked to carry out a sampling exercise on a random selection of files to confirm an average time to review a relevant file.

Alternatively, the Commissioner could ask for a random sample of files to be sent to the Office so that he could calculate his own estimate.

The Commissioner could also ask questions about the files, for example:

- Are the documents in the files filed in any particular way so that the subject matter could be more quickly identified?
- Is there a title/details page which would confirm that the file related to landed property fraud?
- Do particular case-workers work on particular subjects such that the relevant team or individuals could be contacted to narrow the search?
- How many pages are in an average file?

#### **Question 7**

The complainant has suggested one reasonable way in which to obtain the requested information but a public authority is not obliged to consider all reasonable means of obtaining the requested information. Instead, the Commissioner is only likely to find that the estimate is unreasonable where the public authority has failed

to consider an absolutely obvious means of quickly obtaining the information.

In this case, however, the public authority has considered the approach suggested by the complainant and if the Commissioner is satisfied that it would still exceed the appropriate limit to comply even where the authority could have reduced the number of files by using the more general electronic search for fraud files, then the estimate is still reasonable.

### **Test yourself**

1. £600
2. No, although the estimate may be unreasonable where the public authority has failed to consider an absolutely obvious and quicker means of obtaining the requested information.
3. Yes.
4. No.
5. It depends on the terms of the contract. The case-officer may therefore need to see a copy of the contract to see whether this charge can reasonably be included.

### **Question 8**

Request 1 – The Council has not directly argued how this request is related to the other two and why a request about salaries in the legal department is related to parking matters. Therefore, in the absence of any further arguments being put forward it would seem that this request is not seeking the same or similar information as the other two requests and accordingly it cannot be aggregated.

Requests 2 & 3 - It is much harder to say whether these requests should be aggregated. It could be said that both requests relate to parking and given the context provided by the Council, namely that the complainant is focussed on a campaign to make parking free of charge, then parking is an overarching or common theme and accordingly the requests can be aggregated.

However, it could also be argued that the requests are seeking different information as request 2 is concerned with a possible increase to the fee for Blue Badge parking permits whereas request 3 is seeking information about the number of parking tickets. The complainant has not referred to any connection between the requests in either the requests themselves or ongoing correspondence. Instead, the Council has based its assumption that both requests relate to the same issue because of its historic dealings with this requestor. It could also be said that the second request is concerned with future parking issues (any future increase in the Blue Badge parking permit fee) whereas the third request is concerned with parking issues dating back to 2010.

It may also be worth considering whether the fact that the first request was received on 9 March whereas requests 2 and 3 were both sent on the same day is relevant.

There is no right or wrong answer to this fabricated example and it has been created to encourage discussion on this point.

### **Question 9**

The decision notice succinctly sets out the Commissioner's approach. It states that the Commissioner is satisfied that it is:

*"...reasonable for the Council to be of the opinion that the requesters are acting in concert or in pursuance of a campaign and that this satisfied the regulation which merely requires the appearance of acting in concert or in pursuance of a campaign rather than any strict evidential proof" (para 19).*

### **Question 10**

The first point to note is that the public authority is not obliged to aggregate requests even where it is able to do so. Thus, if a public authority wants to respond to requests individually then it can do so. Where it has considered requests in this way, the Commissioner would follow the approach adopted by the public authority and aggregation should not be 'promoted' as this may disadvantage the complainant.

The other issue here is that the public authority's estimate is only £5 over the appropriate limit. If the Commissioner investigates a

complaint and finds that even one element of the calculation is too high then it is likely that estimate will be pushed under the costs limit. At this point the public authority may look for other ways to find that section 12 is engaged, for example, by aggregating the costs of dealing with request 1 and/or 3 which may delay the case or alter the substance of the case altogether.

### **Question 11**

The public authority has 20 days "forward" of the request of 19 October in which to respond to the request. This means that it should respond to the request before 17 November. Accordingly, the requests of 22 November cannot be included in calculating the costs of complying with the request of 19 October.

However, if the public authority had already responded to requests 1-15 and now wanted to apply section 12 to the requests dated 22 November, then it would be able to include the costs of dealing with the requests of 19 and 29 October, 10 and 22 November as all these requests were received within the 60 days "back" from the date of the request of 22 November.

### **Question 12**

The Council has explained that although it could review 1,000 files under the appropriate limit, this was not a valid option for the following reasons:

- the Council could not identify a statistically valid sample,
- even if 1,000 files were selected, these files would not necessarily reveal whether they related to 'bullying' or 'harassment' and the reviewer would have to consider whether the files were relevant which amounted to creating new information which was outside the requirements of the Act,
- the survey results are more meaningful anyway.

As the complainant has not asked for a statistically valid sample and indeed has specifically asked the Council to start at "A" and work through 1,000 files alphabetically, then it would seem that the complainant is not seeking a 'statistically valid' sample and

accordingly the Council should comply with this refined request for the results from all files starting from 'A'.

The Council's argument that it would have to create information seems at odds with saying that the information is held but that it would take too long to comply with the request. This may require further clarification from the Council.

The Council's argument that the survey results are more meaningful is a helpful alternative but not a replacement for providing advice and assistance linked to the specifics of the request. This is unless the complainant is happy to receive this information in lieu of the information she has specifically requested.

## **EXERCISE 1**

---

### **Consider the reasonableness of the estimate**

Firstly, readers should consider whether all nine requests can be aggregated.

As all the requests relate to the FSA's regulation of Northern Rock and more specifically, as all 9 requests focus on the number of meetings various individuals had with Northern Rock; the requests could be said to seeking the same or similar information. Further, as all the requests were from the same complainant and received on the same day, the test for aggregation as set out in regulation 5 is met.

Secondly, readers should consider the reasonableness of the estimate to include, for example, questions such as:

- Is it reasonable to take 15 minutes to search through one lever arch file?
- Are the lever arch files organised in any particular way which would highlight any relevant pages e.g. if meeting minutes are all in one section; if they are all filed at the beginning or end of each file or if meeting minutes are printed on different coloured copy paper etc.
- Is it a reasonable search strategy to search the diaries of staff to find additional detail on any ad hoc or informal meetings or telephone conferences?




- Is it reasonable to allow 4 minutes to review one page of an electronic diary?
- Is it reasonable to base the estimate on a review of diary entries for 650 working days i.e. does this figure to be reduced to take into account annual leave, bank holidays, sickness absence, training days etc during the relevant period?
- The FSA has only indicated that it would take a considerable amount of time to check the diaries of employees involved with Northern Rock. It also failed to provide any estimate at all for the amount of time it would take to search the electronic information. The FSA would need to provide further detail on these activities if the costs are to be included in the estimate.
- How should the Commissioner deal with the points made by the complainant regarding the ease with which this information should be retrieved given the way he has framed his request?

For completeness, here's what the final decision notice says:

*"37. In relation to fulfilling the first request, the Commissioner accepts that an estimate of 15 minutes to review the contents of a lever arch file is a reasonable estimate given that such files contain several hundred pages of paper.*

*Although the process of extracting the information relevant to request 1 is a relatively simple one - essentially creating a tally of the number of times FSA officials met with the directors or management or advisors of Northern Rock plc or its subsidiaries and compiling a list of the dates of any such meetings, in order to create the tally and the list of dates, all of the information contained within a file would need to be read carefully.*

*Thus the Commissioner accepts that an estimate of 15 minutes to review each lever arch file is realistic and when multiplied by the number of files, 78, provides an estimate which marginally exceeds the appropriate cost limit, namely 19 hours.*

38. 

*39. The Commissioner understands that ... the FSA would need to identify current and former FSA staff involved in the supervision of*

*Northern Rock and then undertake a search of their diaries in order to identify any further information relevant to this request.*

*The Commissioner considers this to be a reasonable and logical approach to this task. The Commissioner notes that the FSA has not provided an actual figure for how long these additional searches – i.e. additional to the search of the 78 files – would take.*

*However, on the basis of the time the FSA has estimated it would take to search the diaries of the four individuals for the period in question, 43 hours per diary, and the fact that the executive summary of the report notes that there were 65 FSA staff, both former and current involved in the regulation of Northern Rock, the Commissioner accepts that the process of searching and extracting these diaries for information falling within the scope of request 1 would be likely to significantly extend the time taken to fulfil this request.”*

40. ...

41. ....the Commissioner accepts that the most logical way to locate all of the information falling within the scope of these requests, which comprises the dates which each individual met 'the directors or management or advisors of Northern Rock plc or its subsidiaries' and the dates of each meeting - is to search the diaries of the four individuals named in the requests. The Commissioner also notes that there are approximately 650 working days in the period covered by these requests. He also accepts that as there is not a prescribed format for recording information in calendars the FSA would therefore need to electronically search the individuals' diaries as well as conducting manual searches of meeting notes and minutes in order to ensure that all relevant meetings and their respective dates were identified.

42. However, in the Commissioner's opinion an estimate of 4 minutes per day for each diary may be seen as a little excessive: presumably given that the diaries are held electronically they could be searched relatively quickly and the relevant information extracted more quickly than 4 minutes per day. Moreover, the FSA's estimate does not take into account the fact that the four individuals will not have been in the office for the full 650 working days given that they would have taken periods of annual leave.

43. ... Moreover, even if the FSA's estimate for searching these diaries was scaled back to an average of 1 minute per day and the number of working days each of the individuals was in the office was said to be 570 (allowing for a generous annual leave

entitlement) the time taken to search all four diaries would still significantly exceed the cost limit, 1 minute per day x 570 days x 4 diaries = 2280 minutes or 38 hours.

51. ... the Commissioner notes that the complainant's requests are very broad in scope – for example the first request sought details of all meetings between the FSA and Northern Rock – but at the same time are also quite specific in nature – for example requests 2 to 5 sought details of the meetings attended by particular individuals.

52. The Commissioner is therefore satisfied that although the FSA clearly reviewed and collated significant amounts of information as part of its internal Audit Division's investigation which fell within the scope of the complainant's requests, (i.e. the 78 Northern Rock files) this does not mean that this information was collated in a format which would allow the requests to be answered using a more efficient methodology than that described above. Moreover, as the complainant has sought details of all meetings between the FSA and Northern Rock and in order to fulfil this request the FSA would have to locate all information it holds about Northern Rock. The FSA has been clear, and the terms of reference of the report support this, that not all information it holds about Northern Rock was considered as part of its investigation, rather simply information about the FSA's supervisory approach to Northern Rock.

### **Has the FSA provided adequate advice and assistance?**

In the decision notice, the Commissioner found that the FSA had already provided adequate advice and assistance for the following reasons:

- The public authority had already provided some advice and assistance to enable the complainant to make the refined requests of 3 January 2008.
- It would not be possible to bring these requests within the cost limit by only seeking the information covered by some of the requests because it is likely that it would exceed the cost limit to deal with any one request.
- The Commissioner considers that the complainant was seeking a holistic view of the FSA's regulation of Northern Rock and would not therefore be satisfied by, for example, the FSA searching the 78 files until the cost limit is reached or

search the diaries of just one of the named individuals until the cost limit is reached. The Commissioner found support for this point based on a letter sent by the complainant in which he suggested that he would be prepared to refine requests 1 to 5 to meetings between Messrs McCarthy, Tiner, Sants and Briault with 'directors or senior management of Northern Rock plc' as opposed to meetings with 'the directors or management or advisors of Northern Rock plc or its subsidiaries.'

However, the current position now is more likely to be that the FSA had not provided adequate advice and assistance as it has, in effect, removed the choice from the complainant as to what information may be of interest to him. As such, although the complainant may have initially stated that he wanted a "holistic" view of the FSA's involvement, he may be prepared to accept whatever information can be extracted from searching as many files as possible under the costs limit and this decision should be made by the complainant rather than the public authority or even the Commissioner assuming what the complainant will accept.

## **EXERCISE 2**

---

### **Question A**

It is true to say that a public authority does not have to search up to the costs limit. If the reverse were true, then it would defeat the whole purpose of section 12. The delegate could refer this individual to the ICO's guidance on section 12 which confirms this.

However, where section 12 is engaged, then the public authority needs to turn its mind to its section 16 obligations of providing advice and assistance to the complainant so that s/he may refine the request so that it can be dealt with under the appropriate limit. If it is reasonable to provide such advice and assistance in this case, then any refined request submitted by the complainant should be treated as a new request. However, the Commissioner's approach is that the time the public authority has already spent on dealing with the first request cannot be aggregated with the costs of dealing with the refined request.

### **Question B**

As the Fees Regulations allow a public authority to include the time it would take to retrieve the requested information, it will be possible to include the time it takes to drive the 80 miles to get the relevant files from the previous Secretary.

However, the Council Secretary cannot include the time it would take to photocopy the documents at the local library in the estimate as this is really a communication cost which is not one of the permitted activities under the Fees Regulations when calculating an estimate.

### **Question C**

It is correct that a public authority is not obliged to conduct any searches for the requested information.

However, if a public authority does not carry out any searches, then it needs to produce strong arguments and/or evidence as to why it estimates that it would exceed the appropriate limit from just reading the request. In other words, the ICO would want to be reassured that the estimate was based on facts rather than guesses or assumptions and that the authority had not, for example, exaggerated the number of files which may need to be considered when an actual preliminary search may reveal that that figure is lower.

### **Question D**

In terms of section 12, the Commissioner accepts that any estimate has to be based on the circumstances at the time of the request. This means in this case that it would be accepted that it would take a long time to locate, retrieve and extract the requested information given the state of the records. However, this is not to say that there are no consequences for poor record keeping. For example, if an authority keeps refusing requests on this basis, it may be that the ICO Enforcement Team are notified. There may also be some work required to comply with the authority's section 46 obligations.

It should also be noted that although more and more records are held electronically, there is no obligation under FOI on any public authority to convert manual files into electronic files so although the complainant may be annoyed at the fact the relevant records are

held manually, the authority is not in breach of the Act by not doing so.

### **Question E**

The Fees Regulations allow for the aggregation of requests which are received from the same person, on the same or similar subject matter and received within a period of 60 consecutive working days. Accordingly, if this complainant waits for more than 60 days before sending out a further request, then her requests cannot be aggregated and each request must be complied with and as this complainant has framed her request specifically so that each single request does not exceed the limit, then the authority will be required to comply with these requests unless any exemptions or exceptions apply.

### **Question F**

If an authority believes that section 12 is engaged, then it should issue a refusal notice stating the fact of its reliance on this provision. As a matter of good practice, the refusal notice should provide a breakdown of how the estimate has been calculated, so in this case it would be helpful to explain to the complainant why the 6-8 million records would all need to be searched and why it would take 30 seconds to check each record. Providing this explanation to the requestor may also help a requestor to understand why section 12 has been claimed and thus may avoid a complaint being made to the Commissioner.

Then, the authority would need to consider whether it could provide any advice and assistance bearing in mind that it is only obligated to provide such advice and assistance where it is reasonable in the circumstances.

If the public authority explains that there really is no way in which the request can be refined (for example, the information cannot be searched electronically or the information cannot be simply skim-read to find the relevant detail etc) and therefore that no information can be provided under the costs limit, then it is likely that the public authority will have complied with its section 16 obligations.