

**Ministry of Defence Access to Information
Guidance Note**

Version 6

June 2009

Guidance Note D9: Charging

1. Sections 9 and 13 of the FOI Act make provision for public authorities to charge for the cost of answering requests in certain cases. The Fees Regulations do not apply to:
 - Information made available in accordance with the MOD Publication Scheme.
 - Situations where the provision of information and associated charges are covered by other legislation.
2. EIRs is subject to its own policy on charging- for information on this please see the DEFRA website. <http://www.defra.gov.uk/corporate/opengov/eir/guidance/index.htm>

Trading Funds And Other Areas Of The Department That Normally Charge For The Provision Of Information

4. Trading funds and other areas of the Department that normally charge for the provision of information can use two FOI Act exemptions to continue charging for the information. These are:
 - FOI Act s21 (Information reasonably accessible to the public by other means)
 - FOI Act s43 (Commercial interests)

Annex A contains guidance on this matter.

Appropriate Limits

5. The Fees Regulations require that the costs are estimated at the rate of £25 per person per hour.

£600

a. The £600 appropriate limit relates to “an official” devoting around three and a half days of chargeable staff effort to a request. For the purposes of FOI we regard “MOD” as constituting the department of state, all executive agencies, trading funds and the Armed Forces. The £600 appropriate limit will accordingly apply across the spectrum. It should be noted that although the MOD Police Force is listed separately in Schedule 1 to the Act, it is an agency (MOD Police and Guarding Agency) and therefore subject to the £600 appropriate limit.

£450

b. The following public authorities are associated with MOD but are classed as non-central government bodies. As such, the £450 appropriate limit applies to them. This is assumed to equate to around two and a half days of effort:

- The Advisory Committee on Conscientious Objectors
- The Advisory Group on Medical Countermeasures
- The Animal Welfare Advisory Committee
- The Armed Forces Pay Review Body
- The Central Advisory Committee on War Pensions
- The Dartmoor Steering Group and Working Party
- The Defence Nuclear Safety Committee
- The Defence Scientific Advisory Council
- The Independent Board of Visitors, Military Corrective Training Centre

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- National Army Museum
- The National Employer Advisory Board
- The Nuclear Research Advisory Council
- The Oil and Pipelines Agency
- The Review Board for Government Contracts
- Royal Air Force Museum
- Royal Hospital Chelsea
- The War Pensions Committee

The term “appropriate limit” in the remainder of this document applies to both the £600 and £450 figures.

6. The appropriate limit has deliberately been set at a high level that should not be a bar or dampener to any person applying for information.

Policy On Disclosing Information If The Cost Of Doing So Would Exceed The Appropriate Limit

7. In accordance with Section 12 of the FOI Act, the MOD is not obliged to disclose the information requested, if the cost of doing so would exceed the appropriate limit. This is the policy the MOD is following and will be adhered to in all but exceptional circumstances. Where branches believe that it would be desirable to disclose the information when it is estimated that the appropriate limit will be exceeded, CIO CI Access must be consulted. There will be two options:

- a. Release the information proactively if there is a good public interest-type reason for disclosure (for example via the MOD website), or
- b. Issue a fee notice to the applicant. For legal reasons this must be a last resort and a consistent approach must be applied across the Department.

In all cases, branches have a duty to assist (s.16 of the FOI Act) the applicant to reduce or refine their request to bring the cost of compliance under the appropriate limit.

Determining If The Appropriate Limit Is Likely To Be Exceeded

Standard Hourly Rate

8. Please note that the Fees Regulations requires all public authorities to use a standard hourly rate of £25 per hour per person when calculating the cost of dealing with requests for information.

9. It is important to note that only “**prescribed costs**” **may be taken into account** when calculating the cost of dealing with requests. The cost of finding, sorting, editing or redacting the information should be taken into account when determining if the appropriate limit is exceeded. These are efforts reasonably employed by the branch in:

- a. Determining whether or not the information specified in the request is held.
- b. Locating and retrieving the information, or a document or documents which may contain the information (where appropriate, this would include the recovery charges paid to TNT for information held in the MOD archive).
- c. In extracting the information to be disclosed from other information, including the first time an official reads information for this purpose (NB any subsequent review of the information – including any referral to another member of staff - may not be included).
- d. In communicating information. This is the time taken to write a response to the request, or to summarise, edit or redact information.

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NB: The Code of Practice issued by the Lord Chancellor under s.46 of the FOI Act, requires public authorities to observe standards of record keeping that enable them to meet their obligations regarding the right of access to information. Accordingly, the ICO is likely to be critical if there are regular failures to proceed with requests because information cannot be found within the £600 cost/effort threshold.

Do not take into account

10. The following should not be taken into account when estimating the cost of complying with the request:

- The time taken to check that a request meets the requirement of the FOI Act.
- The cost/effort in assessing the information for the application of exemptions (including consultation with other parties).
- Considering whether a request is vexatious or a repeated request.
- The time taken to calculate any fee to be charged.
- Determining the harm and public interest tests if applicable.
- Obtaining authorisation to send out the information.
- Overheads.
- The time taken to provide advice and assistance to reduce or refine the request.
- Disbursements (see paragraph 12 below).

11. **Branches should treat any borderline cases, ie where the estimated prescribed costs are close to the appropriate limit, as not exceeding the limit. Given that estimates will have to be made early in the process, it is fair to give the applicant the benefit of the doubt in these cases.**

Disbursements

12. These are the costs incurred by a public authority in informing an applicant as to whether or not the information that has been requested is held, and in then communicating the information to the applicant. In simplest terms, this would be the cost of postage in writing to the applicant including, for example, a bundle of photocopied documents or, in rare cases, translation into a different language at the request of the applicant **see Guidance Note D5: requests received other than in written English. The cost of disbursements is not to be taken into account in determining if the appropriate limit is exceeded.**

13. Generally, disbursements should not be charged but those areas of the Department with access to imprest accounts or have established repayment procedures in place (including trading funds) may use them to charge for valid disbursements.

Aggregating Costs of Related Requests

14. Where two or more requests are made to a branch:

- a. By one person, or
- b. By different persons who appear to the branch to be acting in concert or in pursuance of a campaign,
- c. The estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the branch of complying with them all of them.

15. Paragraph 14 applies in circumstances in which:

- a. The two or more requests relate, to any extent, to the same or similar information, and

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b. Those requests are received by the branch within any period of sixty working days.

16. This provision is intended primarily to prevent individuals or organisations circumventing the appropriate limit by splitting a request into smaller parts. Any cases should be referred to CIO CI-Access for advice in the first instance. These may also need to be brought to the attention of the MOJ Clearing House.

Process For Determining If The Appropriate Limit Is Likely To Be Exceeded

17. It is important to note that except for cases where it is obvious that the appropriate limit will not be reached, a simple estimate of chargeable staff effort and other prescribed costs must be made in order to determine if the appropriate limit is going to be exceeded.

The process for considering FOI fees, is as follows:

On receipt of the Request for Information (the 20 working day “clock” starts)

- a. If it is clear from the outset, that the appropriate limit will not be exceeded, branches should process the request as normal.
- b. If it is unclear whether or not the appropriate limit will be exceeded, for example in requests for a lot of information that would involve a lot of collation from various sources, branches should make an early estimate of the prescribed costs. The standard hourly rate of £25 should be used for calculating staff “effort”. As the prescribed costs will arise at an early stage in the process, branches should be able to estimate that the appropriate limit will or will not be reached well before the 20 working day time limit. If it becomes evident that the appropriate limit is going to be exceeded, the action at sub-paragraph c below should be taken as soon as possible.

If it is estimated that the appropriate limit is going to be exceeded

- c. When it is estimated that the cost of complying with a request for information is going to exceed the appropriate limit, branches should send a “Notification of Excess Costs” letter to the applicant using the template in related links. This will invite the applicant to reduce or refine their request for information to bring the cost of compliance under the appropriate limit and to offer a contact, in the branch, who will be able to assist them to do so. The response must include details of the appeals process if the applicant is dissatisfied with the decision.
- d. Branches must assist the applicant to reduce or refine their request if they show interest in doing so.

Estimating the Cost

If you plan to use s.12 you must prepare an **estimate** of the cost, this is required in the event of an appeal. You are **not** obliged to provide this estimate to the requester (a template response letter with example of wording is available).

You should **not** comply with part of the request up to the limit - you need to consult the requester. You **must** attempt to help them refine the request- e.g. tell them what you **could** provide.

Section 12 makes it clear that a public authority does not have to make a precise calculation of the cost of complying with a request. Only an estimate is required; the costs estimates must be reasonable and only based on those activities described in regulation 4(3) listed above.

What you **cannot** count is:

- time spent on considering exemptions
- costs relating to data validation

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the determination of a reasonable estimate can only be considered on a case by case basis and any estimate should be sensible, reasonable and supported by evidence.

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ANNEX A

Trading Funds Position

1. The FOI Act has always been intended to build on existing channels for providing information: to provide access to information where that access did not previously exist, rather than replacing existing access regimes. Where information is reasonably accessible to applicants through other means, and *in particular* where information is made available by or under either a separate enactment or an authority's publication scheme, it is exempt from FOI and from its costs and charging regime.

FOI Act Section 21 Exemption

3. Section 21 of the Act provides that information is absolutely exempt if it is "reasonably accessible" to the applicant. Information will always be considered reasonably accessible if:

- The authority is obliged to communicate it to the applicant under some other Act, or
- The information is made available in accordance with the authority's publication scheme

Public authorities, including trading funds, can charge fees outside the terms of the FOI Fees Regulations for providing information through the publication scheme, provided that this is made clear as part of the scheme. For example, this could include fees for specific pieces of information, or information about how any fees would be charged (such as a set rate per hour of work, a scale of charges, or the market rates for the work). Therefore, as long as the authority, including trading funds, has listed the information or classes of information that it trades in within its publication scheme, and the conditions under which information will be provided, it will be able to charge for providing the information in accordance with the publication scheme. In addition, if the authority, including trading funds, decides to trade in new areas of information in the future, this can also be added to the publication scheme.

FOI Act Section 43 Exemption

5. FOI Act Section 43 provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person (or the authority holding it). This includes organisations, such as trading funds, because they are themselves engaged in commercial supply activities either as a prime or subsidiary activity. If a decision is made to apply the s.43 exemption, there needs to be a further decision made on the public interest in disclosure. At a very general level, there is a public interest in protecting the commercial interests of the public sector, including trading funds.

6. Trading funds and other areas of the Department with commercially valuable information may, after applying the exemption above, want to apply a market-based charge for "raw" information, outside the FOI regime.