



MOD FOI/EIR Compliance Notes

Initial Handling of Requests for Information

CN7: Section 12 Refusal – Refusing a Request if the Cost of Compliance would exceed the Appropriate Limit and Aggregation of FOI Requests

Document history

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What this is about:

This note provides an overview of the Section 12 exemption under the FOIA – where the cost of compliance in handling a request exceeds the appropriate limit. It provides an outline of what can be included in the prescribed costs when responding to an FOI request, how to provide advice and assistance to the applicant to reduce or refine their request so that if possible it can be handled within the appropriate limit. This note also outlines what aggregation is, how to aggregate requests, and how to provide an aggregated response. There is also a “Costing Exercise” which provides an example of the actions that do or do not count towards the cost limit.

Detail:

- In accordance with Section 12 of the FOI Act, the MOD is not obliged to comply with a request for information if the cost of doing so would exceed the appropriate limit.
- Section 12 of the Act specifies that public authorities are not obliged to comply when requests are estimated to cost over the “appropriate limit” (This is currently set at £600 for central government, £450 local Government). Where the cost exceeds the appropriate limit the Act allows public authorities to charge for handling requests but this is not mandatory. Central Government Departments, as a matter of policy, do not charge and rely on the Section 12 provision for non-compliance where it is appropriate to do so.

Branches still have a duty to assist under section 16 of the FOIA) the applicant to reduce or refine their request to bring the cost of compliance under the appropriate limit. Refinements which might be suggested include:

- Reducing the timeframe the requester is interested in, thus reducing the volume of information to be searched for;
- Reducing the scope of the request so that it covers less information
- You should not be seen to lead the requester by suggesting only a single method of refining a request as this might be construed as an attempt to dissuade him from asking for other information which presentationally might be more sensitive to disclose)
- If the refinement agreed or suggested by the requester does not allow for compliance under the appropriate limit you are not obliged to continue to try and identify or suggest further methods until you establish a way of meeting the terms of the refined request within the appropriate limit.

Also see separate Compliance Note 8 - Section 16 (advice and assistance)

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

- 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, “MOD” comprises the Department of State, all executive agencies, trading funds and the Armed Forces.
- 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.

Determining If the Appropriate Limit Is Likely to be Exceeded

It is important to note that only “**prescribed costs**” may be taken into account when calculating the cost of dealing with requests. These costs only cover activities relating to finding and retrieving information. **Other FOI processing activities such as consulting subject matter experts on content, considering the application of exemptions or redacting the information are not to be taken into account when determining if the appropriate limit is exceeded.** The specific activities which can legitimately be included are described below:

- Determining whether or not the information specified in the request is held. (For example, emailing a number of MOD branches to ask whether they are likely to hold in-scope information). Where it is not possible to determine whether information is held without exceeding the appropriate limit there is no obligation to advise the requester whether or not information is held. Where this initial step locates some information, but it is not possible to complete the additional steps below without exceeding the appropriate limit, the requester must be advised that information is held.
- Locating and retrieving the information, or a document or documents which may contain the information. (for example this would cover the activity carried out by the branches mentioned above where they respond that they believe they may hold some information). It does **not** cover the costs involved for transit of information. Costs and time for private contractors to find and deliver documents should not be counted towards the cost limit.
- Extracting the information in scope of the request from other information not in scope of the request, 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 nor can extraction time if all of the information under examination is in scope of the request eg all of the contents of a document or file). If all of a document or a file is obviously in scope of a request no costs will fall to be counted against this activity.
- It is often mistakenly believed that a public authority can take into account the costs attributable to the time that **external contractors** charge to retrieve information they hold on behalf of the department. In fact, it is not the actual cost which external contractors charge the MOD but the hourly rate as per the FOIA fees regulations at £25 per hour that should be taken into account. Unless an external contractor estimates that it will take them over 2.5 days then you cannot refuse a request by engaging s.12 - you must cost external contractors time as you would civil servants.
- Where contractors are involved in determining whether the public authority holds the requested information, or in locating, retrieving or extracting that information, the total cost charged by the contractor to the public authority cannot be included in cost calculations - any staff time (either employee or contractor) can only be taken into account at the rate of £25 per hour.

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Adding Together Costs – Aggregation

What is aggregation?

- You may find that you receive a number of requests from the same person (or different people but where you have reason to believe that they are acting in concert) asking for the same or similar information within a short time of each other.
- Under section 12(4) of the Act it is permissible to aggregate such requests and to regard the cost of handling one of them as the cost of handling them all.
- The Section 12(4) provisions provide an effective remedy against requesters who may otherwise separate requests for the same or similar information in the belief that they may avoid breaching the appropriate cost limit.
- **When Info Access receives a number of requests from the same person** (or different people who are acting in concert) **asking for the same or similar information** within a short time of each other, **the requests will all be allocated to one business area**, which has the main responsibility on the subject matter, to take the lead on aggregating the requests. Other business areas which also have some responsibility on the subject matter will be copied in to help with the costing exercise so that any legitimate opportunity for aggregating is not overlooked.

When can I aggregate requests?

You should only aggregate requests in the following circumstances:

- two or more requests for information have been made to the same public authority and the cost of handling one or more of them would breach the section 12 limit, the determination of whether a single communication from a requester constitutes one or more requests should be based on the subject matter of the information requested. However this only becomes a consideration if it is not possible to provide some or all of the information in scope of the requests without breaching the appropriate cost limit.
- they must be either from the same person, or from 'different persons who appear to the public authority to be acting in concert or in pursuance of a campaign'
- the requests must relate to the same or similar information; ie if they relate to any extent to the same or similar broad theme with a common thread running through them they can be aggregated for the purpose of considering the application of section 12.
- they must have been received **within a space of 60 consecutive working days**.
- One focal point considering multiple requests on the same or similar subject together allows it to take an overall view of the broad theme of the requests and to decide which requests fall within it and those which do not and to what extent the application of section 12 may apply. Those which do not fall within the broad theme identified for requests suitable for the application of aggregation under section 12(4) should be handled as a stand-alone request.
- Requests that clearly fall under different regimes (FOI/EIRs or DPA) cannot be aggregated (NB: When a request is considered under the EIRs there is no 'cost limit', but requests which exceed the cost limit can be refused on the basis that they are manifestly unreasonable, subject to the PIT.

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- If the estimated cost of complying with any element of the request is deemed to exceed the appropriate cost limit the Department must send the requester a cost refusal response and
- provide advice and assistance on what the requester needs to do; and to ensure that any future request can be answered within the time and cost constraints permitted. The refined request when received becomes a new request and the statutory time for compliance commences on the date of receipt.

Don't forget that you do not need to make a precise calculation of the staff costs for complying with each request and only a reasonable estimate is required.

Providing an aggregated response

- If the estimated cost of complying with the collective requests can be dealt with and answered within permitted time and cost constraints, an aggregated response should be sent to the requester.

For further information – see the ICO's detailed guidance:

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx

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Costing Exercise - A Practical Example & Answer

You have a request for “all briefings, memos and correspondence from PJHQ regarding casualties in Op TELIC from March 2003 to March 2006”.

How much *does* it cost?

Action	Does it count?	Total Hours	Total Cost (at £25 per hr per person)
An email to the relevant branch from the FOI Focal point to ask whether it is likely any information is held, and the response from subject matter expert.	Yes	0.25	6.25
3 people spend 5 hours each identifying a total of 30 files that may contain the information. This involved locating the file`s location from the electronic database and physically retrieving the files from the storage location	Yes	15 (3x5)	£375
2 people spend 7 hours each going through those files to extract 40 documents that fall within the scope of the request.	Yes	14 (2x7)	£350
The Subject Matter Expert (SME) spends 5 hours reading all 40 documents and identifies 20 that can be released unaltered.	No	--	--
The SME spends a further 8 hours consulting on what sections of the remaining 20 documents must be withheld.	No (not locating, retrieving or extracting specific info)	--	--
The SME spends 2 hours working out the Public	No (not locating,		

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Interest Test	retrieving or extracting specific info)	--	--
It takes one person a further 8 hours to redact out the sections identified by the SME	No (not locating, retrieving or extracting specific info)	--	--
Total		29.25	£731.25