

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2019

Public Authority: Office for Nuclear Regulation
Address: Building 4 – Redgrave Court
Merton Road
Bootle
L20 7HS

Decision (including any steps ordered)

1. The complainant has requested information from the Office for Nuclear Regulation (ONR) about inspections, safety defects and improvement deadlines over a 2 year period. The ONR applied section 12(1) of the FOIA to the request, as it estimated the cost of compliance would exceed the appropriate limit.
2. The Commissioner's decision is that the ONR applied section 12(1) of the FOIA incorrectly as it did not reasonably estimate that the cost to comply with the request would exceed the appropriate limit. She also finds that in failing to adequately advise the complainant on how to refine his request to bring it within the cost limit, the ONR breached section 16(1) of the FOIA.
3. The Commissioner requires the ONR to take the following steps to ensure compliance with the legislation.
 - Write to the complainant with a fresh response to the request that does not rely on section 12(1) of the FOIA.
4. The ONR must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 5 August 2018, the complainant wrote to the ONR and requested information of the following description:

"1/ Please provide all inspections of AWE Aldermaston and AWE Burghfield in the last six calendar years

2/ please provide all details of instances where safety defects were discovered at each site in the last six calendar years for both sites (e.g what was the defect and what was found to be wrong)

3/ please provide all details of instances where deadlines for safety improvements being missed for both sites (e.g what was the improvement)"

6. On 30 August 2019 the ONR responded. It applied section 12 of the FOIA to refuse the request because it estimated the cost of compliance would exceed the appropriate limit. To assist the complainant in refining his request and bring it within the cost limit, the ONR advised him to consider reducing the timeframe and identify a specific topic area. To assist him with this the ONR suggested the complainant review site reports available on its website and provided the relevant links.
7. On 4 September 2018 the complainant wrote to the ONR refining his request. He requested all the same information he previously requested (above) but only covering the last 2 year period and only relating to LC27 safety mechanisms, devices and circuits, and LC34 leakage and escape of radioactive material and waste.
8. On 2 January 2018 the ONR responded. In regard to point 1 of the request, it said that it had undertaken 88 inspections over both sites in the last 2 years and produced 69 intervention reports. It reviewed the reports and identified 17 that relate to LC27 and LC34. It said that given the length of time already taken to determine the information is held, locate and retrieve it and then factoring in the time required to extract it from the reports, providing the requested information would exceed the appropriate cost limit and applied section 12 of the FOIA to refuse the request. It however provided links to the executive summaries of 16 published intervention reports on its website.

9. On 31 October 2018 the ONR conducted an internal review and wrote to the complainant maintaining its position.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. The Commissioner has considered whether the ONR was correct to apply section 12 of the FOIA to refuse the request. She has also considered whether ONR has fulfilled its obligations under Section 16 Advice and Assistance.

Reasons for decision

Section 12 of the FOIA – cost of compliance exceeds limit

12. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").
13. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.
14. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating a document containing the information;
 - retrieving a document containing the information; and
 - extracting the information from a document containing it.
15. The four activities are sequential, covering the retrieval process of the information by the public authority.

The Complainant's view

16. The complainant disputes the ONR's application of section 12 of the FOIA to his request. He said it is unreasonable for it to claim that it would take 18 hours to comply with the request.

The ONR's submission

17. The ONR has explained that it carried out a costing exercise to establish whether or not the requested information could be provided within the appropriate limit under section 12 of the FOIA.
18. The ONR submitted its assessment of time spent determining the information was held and locating and retrieving it. It said that a member of staff carried out a search of its content management database (CM9) using a selection of key words relating to the request. The search function only permits searches of document titles and not their content. It said that it took an average of 1 minute to input each search term, perform the search and provide a result. The result is a list of documents that contain words in the title that match the search term. It undertook 24 separate searches which produced 24 lists with some returning over 500 documents potentially in scope of the request. $1 \text{ min} \times 24 = 24 \text{ minutes}$. It explained that due to CM9 limitations it was unable to narrow the search by date electronically so each of the lists produced contained all documents potentially in scope. The lists therefore then needed to be sorted and manually reviewed to determine the date. It spent 3 minutes reviewing each of the 24 lists and identified 69 documents (reports) that potentially held information within the scope of the request. $3 \times 24 = 72 \text{ minutes}$. It then spent 2 minutes accessing each of the 69 reports from the system and reviewing their cover sheets. It explained that the reports have the same standardised cover sheet, each containing a list of specific licence conditions for that inspection, although the ONR has 36 licence conditions, only information relating to 2 licence conditions were within the scope of the request, the Divisional Delivery Support team therefore opened each report and read the cover sheet list to determine if either of the 2 licence conditions (within scope) was referenced in the document, this identified 17 reports containing information within scope of the request. $2 \times 69 = 138 \text{ minutes}$ (2.3 hours).

19. The ONR's assessment also includes the time it would take to extract information within the scope of the request from the reports. The ONR explained that to extract all the relevant information (within scope) from the reports involved a 3 stage process. The first stage involved a Principal Inspector (PI) with relevant technical knowledge in the subject area reading each of the 17 reports in their entirety and highlighting but not extracting information they deemed within scope of the request. The ONR said that the reports vary from 8 to 30 pages (275 pages in total) containing technical information about the Atomic Weapons Establishment and that it took the PI a total of 27.5 hours to complete this exercise due to the specific nature of the request and the technical and complex content of the reports. It explained that for technical material, the industry average reading speed is 75 words per minute, thus taking 6 minutes to read a page. $275 \text{ pages} \times 6 \text{ minutes/page} = 27.5 \text{ hours}$. The ONR explained that the second stage of the extraction process would involve a more senior superintending inspector (SI) carrying out a 'deep review' of the information (in the reports) that had been highlighted by the PI for extraction to ensure that the information is within scope and to identify any sensitive nuclear information. It said it carried out a sampling exercise and estimated that the highlighted information amounted to 6 pages per report and based on the industry average reading speed it would take 10 hours and 12 minutes for the SI to review all the information identified for extraction. $6 \text{ pages} \times 17 \text{ reports} \times 6 \text{ mins per page} = 612 \text{ minutes}$ (10 hours and 12 minutes). The ONR said that in order to follow due governance, the third stage of the extraction process involved consideration and clearance of the information (identified by the PI and agreed by the SI) by a Divisional Director who would authorise disclosure. It failed to provide a breakdown of the tasks that would be carried out or a cost estimate for this work in its submissions to the Commissioner.

The Commissioner's view

20. When dealing with a complaint to the Commissioner under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requester within the appropriate costs limit.
21. The Commissioner has considered the costing exercise undertaken by the ONR. In order to determine whether the information was held, the Commissioner notes that it took the ONR 24 minutes, 1 minute per search, to carry out all 24 searches on its content management

database and that this resulted in 24 lists being produced (identifying documents potentially holding information within the scope of the request). In order to locate and retrieve the information, the Commissioner notes that due to CM9 limitations it took the ONR 72 minutes, 3 minutes per list, to review and sort lists (including those containing larger numbers of documents) to identify reports and 138 minutes (2 hours and 18 minutes) to open and read the reports in order to narrow them down to 17. The Commissioner considers the detailed explanation about the actions the ONR has had to take to determine the information is held and to locate and retrieve it both plausible and persuasive. She however notes that CM9's search function only limits searches to be carried out on document titles and not their contents and therefore questions the potential of further information potentially within the scope of the request to exist but that has not yet been identified.

22. In regard to the time required to extract the information, the Commissioner has considered the ONR's comments about the technical and complex nature of the information contained within the reports and the scope of the request, she is not however persuaded and has not been presented with any evidence in this case that it took the PI an average of 6 minutes to read *each* page of the 17 reports (275 pages in total). She notes that although the ONR has confirmed that the PI undertook this work, spending 27.5 hours highlighting and reviewing the information for extraction, the breakdown (of average minutes per page) is based on the industry average reading speed as opposed to the time actually spent by the PI reviewing each report. She also notes that the ONR has not provided any indication of the average number of words per page of the reports; only confirming that the reports vary in length (8 to 30 pages) and is mindful that the reports contain pages that are likely to be shorter in length to pages forming the main body of the report, e.g., cover, contents pages etc. She also notes that the ONR estimated that the PI had highlighted the equivalent of 6 pages per report of information to be reviewed by the SI and that some of the reports contain up to 30 pages. The Commissioner also notes that the ONR has included a further 612 minutes (10 hours and 12 minutes) to carry out a second review of the highlighted information by a SI, although it failed to provide the Commissioner with any information about the sampling exercise carried out in determining this estimate. She also notes that the ONR has stated that a further unspecified amount of time would be required for a third review for consideration, clearance for release and extraction of the highlighted information by the Divisional Director. It is clear to the Commissioner that the ONR is describing the process of considering exemptions in the second and third stages of its extraction process, rather than the far more limited task of extracting the data as allowed under the Fees Regulations.

23. In light of the above the Commissioner is not satisfied that the simple tasks set out in regulation 4(3) of the Fees Regulation, which, in this case include determining the information is held, locating and retrieving it, when combined with extracting information within the scope of the request from the reports, would exceed the appropriate limit. The Commissioner finds that the ONR is not entitled to rely on section 12 to refuse the request.

Section 16 of the FOIA – Advice and Assistance

24. Section 16 of the FOIA imposes an obligation on public authorities to provide advice and assistance to a person making a request, so far as it is reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed to the provisions in the Code of Practice in relation to the provision of advice and assistance to bring the cost of a request under the appropriate limit. This can be found in paragraph 2.10 of the Code.
25. Paragraph 6.9 of the Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:
- "... should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is arrowed¹"*
26. The complainant said his request was narrowed down following advice from the ONR to reduce the timeframe and identify a specific topic area and he therefore believes that it was unreasonable for it to apply section 12 of the FOIA to his refined request. The Commissioner considers this to be an issue as to whether the ONR provided sufficient advice and assistance under section 16 to allow the complainant to bring the scope of his request within the costs limit.
27. The Commissioner notes that in its internal review to the complainant, the ONR stated that although it could have been clearer in explaining

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

the difficulties in accessing information within the scope of the request it had fulfilled its obligation to provide advice and assistance under section 16 of the FOIA:

"In my opinion the advice and assistance provided by ONR was reasonable as we provided some considerations to assist you in refocusing your request (reducing the timeframe and identifying a specific topic area by reviewing Local Liaison Committee reports). However, I find that it may have been helpful at this stage to explain the difficulties of accessing this information in the form requested. I believe that we could have provided a clearer steer to enable you to be more specific in refining your request by explaining how the information was held, its sensitivity and how you could have potentially accessed it within the cost limit. Further clarity could also have been provided around the £600 cost limit which ONR works to, supported by an overview of how costs are calculated. These learning points will be taken forward by ONR to determine a policy on FOI charging and consider how we can develop a formula which makes it clear when the scope of an FOI exceeds the appropriate limit."

28. The ONR has explained to the Commissioner that in order to assist him in bringing the cost of complying with the request within the appropriate limit, it advised him to consider reducing the timeframe and identify a specific topic area. Whilst this was of some limited help, it does not actually explain to the complainant how the information is held and how he might be able to refine his request. Whilst the Commissioner understands that this is not always possible to do so, the ONR has not provided sufficient clarity as to how he could do this.
29. The Commissioner appreciates the complainant's view that they simply followed the ONR's advice to narrow his request on the basis it suggested and it was therefore unreasonable for it to continue to apply section 12. Given the ONR's own recognition that it could have improved its response to the complainant the Commissioner considers that if it had done so the complainant would have been in a much clearer position as to how he could have refined his request to try and bring it within the cost limit. The Commissioner does not therefore agree with the ONR that its response was reasonable or that it has fulfilled its statutory obligations under section 16.
30. In failing to offer adequate advice and assistance to the complainant on how to refine his request so that it was within the cost limit, ONR breached section 16(1) of the FOIA. As the requirement to remedy this breach has been superseded by the step in relation to the section 12(1) finding, no remedial step in relation to this breach is required.

Right of appeal

31. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

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