

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2024

Public Authority: Oxford Direct Services Limited (ODSL)
Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant requested copies of communications between Oxford Direct Services Ltd (ODSL) and its auditors that related to ODSL's financial accounts for 2021-22.
2. ODSL initially refused to provide the requested information under section 43(2) - commercial interests, of FOIA, and then upheld this decision at the internal review stage.
3. During the Commissioner's investigation, ODSL revised its position, and issued a fresh response to the complainant which confirmed that it was now relying on section 12(1) – cost limits, of FOIA as its basis for refusing to comply with the request.
4. The Commissioner's decision is that ODSL has failed to demonstrate that section 12(1) of FOIA is engaged, and therefore, it is not entitled to rely on this exemption.
5. The Commissioner requires ODSL to take the following steps to ensure compliance with the legislation.
 - ODSL must issue a fresh response to the request which does not rely on section 12(1) of FOIA.
6. ODSL 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

7. On 20 July 2023, the complainant wrote to ODSL and requested information in the following terms:

“Please provide copies of all communications you hold between ODSL and the auditors concerning the ODSL 2021/22 accounts.”
8. ODSL’s response to the complainant of 16 August 2023, confirmed that the requested information was being withheld under section 43(2) of FOIA. On the same date, the complainant requested an internal review, arguing that ODSL should release information which provides the public with further explanations regarding the delay in submitting its accounts for the year 2021-22.
9. On 14 September 2023, ODSL provided its internal review response. It upheld its previous decision that the requested information was exempt from disclosure under section 43(2) of FOIA.
10. During the Commissioner’s investigation, ODSL reviewed its handling of the complainant’s request, and advised it wished to revise its position. On 5 March 2024, ODSL issued a fresh response to the complainant which confirmed that it was now relying on section 12 as its basis for refusing the request.
11. ODSL advised the complainant that it was unable to provide any advice and assistance, stating that even if the request were to be refined, “it will not change the age of the records you have requested.”
12. ODSL also informed the complainant that whilst it was now relying on section 12 as its basis for refusing the request, it still considered section 43(2), and also section 41- information provided in confidence, of FOIA to apply to the requested information.

Scope of the case

13. The complainant initially contacted the Commissioner to raise concerns about ODSL’s decision to withhold the information relevant to the request under section 43(2) of FOIA. Following receipt of ODSL’s revised response of 5 March 2024, the complainant said that they remained dissatisfied, and did not accept ODSL’s claim that section 12 is engaged.
14. As ODSL has, upon further review, advised that it is now relying on section 12(1) of FOIA as its basis for refusing to comply with the

request, the Commissioner will not consider any other exemptions that have previously been cited by ODSL.

15. The Commissioner will therefore only decide whether ODSL is entitled to refuse to comply with the complainant's request under section 12(1) of FOIA.

Reasons for decision

Section 12 – cost of compliance

16. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if that authority estimates that the cost of compliance with the request would exceed the "appropriate limit".
17. The "appropriate limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) and is currently set at £600 for central government departments, and £450 for all other public authorities (which would include ODSL). A maximum of £25 per hour can be charged to undertake the work required to comply with the request and for "other public authorities", such as ODSL, this equates to 18 hours work.
18. In estimating whether compliance with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that an 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.
19. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
20. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. In accordance with the First-tier Tribunal in the case of [Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004](#), the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence."

21. In its revised response to the complainant, and its communications to the Commissioner, ODSL has described in some detail the technical difficulties and constraints it experienced when attempting searches to locate information relevant to the request. ODSL has explained that this was due, in part, to "complexities" of its "data infrastructure", and also a migration of its systems (including email system), and drives, which took place between June 2023 and December 2023.
22. ODSL has also said that the immense volume of data across multiple servers further exacerbated the challenges it faced when conducting searches, and resulted in incomplete, partial search outcomes and inaccessible files.
23. ODSL has confirmed that the searches it has described were carried out at the time that the request was received, but that any attempts to conduct the same searches now would lead to the same results.
24. ODSL has provided the Commissioner with a copy of an excel spreadsheet which sets out a list of 1251 items; ODSL states that this is the result from the search that was carried out that had a "partial" outcome.
25. ODSL has said that as the search outcome only provided a partial result, it was not able to access any of the 1251 items listed, and it was therefore unable to ascertain the exact extent or relevance of this information to the original request. ODSL has said that a comprehensive review and extraction of this information was therefore not feasible, and it had been unable to conduct any sampling exercise in this instance.
26. The Commissioner considers it appropriate to note that any arguments presented by a public authority that directly relate to an inability to access certain information would not be relevant to the application of section 12. This is because information which is found not to be accessible is not, in itself, directly related to the costs of compliance (although if there is an alternative way of accessing such information, the time or resources required to do this may be relevant).
27. In addition, whilst ODSL has said that due to the technical constraints encountered with its searches it was unable to conduct a sampling exercise, a public authority is not required to take such action when applying section 12 (although it may choose to do so to support its reasoning for the estimate it has provided which exceeds the cost limits).
28. However, the Upper Tribunal in [\(Reuben Kirkham v Information Commissioner \[2018\] UKUT 126 \(AAC\) 11 April 2024](#), (Reuben Kirkham case) explained (in paragraph 18 of its decision) that if a public

authority “.....did not make an estimate, it is not entitled to rely on this section, as the existence of an estimate is a precondition for the application of the section.”

29. The Upper Tribunal also said that where an estimate is given, in accordance with regulation 4(3) of the Fees Regulations, consideration must then be given as to whether the estimate included any costs that were either not reasonable, or not related to the matters that may be taken into account.
30. The Commissioner’s [guidance](#) on section 12 says that an estimate does not have to show the exact costs of complying with the request, but it must be robust enough to establish whether the request would exceed the appropriate limit. If it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls.
31. In this case, the only figure provided by ODSL is the 8 hours which it stated is the total time taken by two officers to carry out the search of the system which led to a partial result. ODSL has not gone on to provide any other calculations which would confirm that the estimated cost of compliance would exceed the appropriate limit.
32. ODSL has had three opportunities to set out its position; the original response to the request, the internal review stage, and the revised response following the complaint made to the Commissioner. It has also been given the opportunity to set out its position in more detail in its response to the Commissioner’s letter of investigation. This, in the Commissioner’s view, provides ample opportunity for ODSL to set out a full and clear position.
33. In the Reuben Kirkham case the Upper Tribunal said that it is not for the Commissioner (or the Tribunal) to undertake for themselves the task of making an estimate of the costs likely to be incurred.
34. In light of the above, as ODSL has failed to show that the estimated costs of compliance would exceed the appropriate limit (as it has not provided any evidence that it has calculated the estimated cost of compliance), the Commissioner must find that the exemption at section 12 is not engaged in this instance.
35. As ODSL was not entitled to rely on the exemption at section 12 to refuse to comply with the complainant’s request, it should take the step described in paragraph 5 of this decision notice.

Other matters

36. ODSL advised the complainant in its revised response of 5 March 2024, that whilst it was now relying on section 12(1) of FOIA as its basis for refusing the request, it still considered that section 43(2), and also section 41, of FOIA would apply.
37. As ODSL confirmed that it was refusing to comply with the request under section 12, it was not necessary for the Commissioner to consider ODSL's claim that it considered that other exemptions would have been applicable. However, the Commissioner regards it to be relevant to note that it is not appropriate for a public authority to cite certain exemptions, such as section 43(2) and section 41, in response to a request without having first considered the content of the relevant information.

Right of appeal

38. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Suzanne McKay
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