

COST OF COMPLIANCE – section 12

SLIDE 1 – INTRODUCTION & SCOPE OF PRESENTATION

Hello, my name's Terna Waya, and I'm one of the senior upstream regulation officers in the FOI directorate at the ICO.

I've only got 20 minutes so I'm going to stick to the key individual elements of refusing requests on the grounds of cost and burden.

At the end of my presentation, You should be able to know the different evidence requirements when refusing a request on either basis.

Hopefully I'll still have time to then give you a quick run through of some of our upstream supportive resources for FOI practitioners.

I'm happy to take your questions at the end of each segment.

Let's first take a look at how to refuse costly FOI requests.

SLIDE 2 –

Section 12 FOIA allows you to refuse costly requests for information.

Costly requests are initially worked out on time taken basis.

So, depending on which sector your organisation falls under, you can refuse to comply with a request if you estimate it taking more than 18 or 24 hours to comply.

To calculate cost, Time for compliance is then rated at £25 per person per hour, regardless of who does the work, so it could include external contractors.

Police authorities don't have to comply with a request if it would exceed 18 hours to do so. In cost terms, this works out as: 18 hours x the staff rate of £25 = £450. So if it'll take over £450 for a police authority to comply with a request, then they don't have to.

So how do you calculate the cost of complying with a request you think it would exceed the £450 cost limit?

SLIDE 3 - ACTIVITIES

You can only take into account four broad activities when calculating the cost limit.

These are, the time it would take one person:

to determine whether the requested information is held (if you didn't know that already)

to locate the information

to retrieve the information

and extract the information if necessary.

So, you have to work out the total amount of time it would take one person to carry out these activities and then multiply this by £25 to get your cost estimate.

When responding to a request, it's good practice to include a step by step breakdown of the actions one person will need to take for each of these activities.

For example, in relation to determining whether you hold information, do you need to run multiple electronic searches? The estimated amount of time it would take to review search results, and so on.

Sampling exercise

A sampling exercise is usually a good way to help you evidence your position.

So consider running a sampling exercise using one or two of the activities. For example, a sampling exercise to determine how long it would take one person to locate and retrieve relevant information.

Share the outcome of the sampling exercise with the requester, along with a breakdown of how you've arrived at your estimate.

Your estimate should always be reasonable.

Don't forget to invite the requester to refine their request whenever possible to enable you comply within the cost limit.

Why should you take this approach?

Breaking down the actions you'll need to take in a step by step way at the refusal stage will save you having to repeat this exercise to the ICO, should we receive a complaint.

Sharing your evidence with the requester could help them narrow down their request faster and also saves you time.

Advice and Assistance: Remember to be as helpful as possible to requesters who have submitted a request that exceeds the cost limit.

They are not usually subject matter experts and are relying on you being transparent about how your records are held to support them with their request.

Other things to be aware of:

I'll quickly share a few things you should also be aware of before we look at burdensome requests.

Redaction - You can't include the time it would take to redact exempt information when calculating the cost limit in section 12.

Aggregation – You can combine two or more requests from a requester for similar information when calculating costs, if the additional requests were received within your statutory time for compliance, usually 20 working days.

READ s12 guidance- Please do read our detailed s12 guidance if you're unsure about whether to include an activity when calculating costs.

S12 TOOL – To support you, We're planning to produce a tool or bitesize product to help you calculate your estimate more quickly, so watch this space.

Let's now talk about burdensome requests.

BURDENSOME REQUESTS – section 14(1)

SLIDE 1

Burdensome requests could inform your decision to deem someone's request vexatious under section 14(1) FOIA.

Generally speaking, you take a combination of factors into account in order to determine whether a request is vexatious, such as; the motive of the requester, evidence of harassment, purpose, and the burden of compliance.

However, you are also allowed to decide whether a single request, possibly from a reasonable & polite requester, would nonetheless place such a significant burden on your resources that this outweighs any value that the request may have.

In most cases, such a request would be deemed too costly under section 12 FOIA.

So it's good practice to initially consider whether section 12 applies to the request, if your main concern is the cost of locating and extracting the information.

Otherwise, you can consider whether to refuse the request on the grounds of the burden of compliance.

SLIDE 2

So how can you refuse a request on the grounds of burden alone?

The bar for refusing a request on this ground is quite high.

According to the Information Rights Tribunal, such a request has to be: "grossly oppressive in terms of the resources and time demanded by compliance."

So in practice, you can refuse a request as too burdensome to comply with if;

The requester has asked for a substantial volume of information – usually not limited by scope and timeframe.

For example: "All of the information you hold on an investigation." This investigation however dates back twenty odd years, went on for at least 8 years, and produced more than two thousand records.

Secondly, You're concerned about potentially exempt information.

For example: The requested information could be relevant to live investigations or could reveal personal information.

You should be able to provide evidence to the ICO to support this claim.

Thirdly, The potentially exempt information can't be isolated without significant effort and time.

For example: You'll need to go through two thousand records just to be sure you're not going to publish exempt information.

These are the key elements which to evidence when refusing a request on the grounds of burden.

Public Interest

What about the public interest test?

Unlike when you refuse a request on cost grounds under section 12, you need to also take account of the public interest in the subject of the request.

So, regardless of importance of the subject matter or issue, you could refuse a request under section 12 if the cost of compliance exceeds £450 or £600.

On the other hand, There is no predetermined cost for refusing a request on the grounds of burden.

The value or purpose of the request would be relevant however, and therefore the public interest.

So, in practice, this means it would take a higher burden to refuse a request relating to corruption allegations than it would take for a request about the number of tea mugs used by senior managers.

Advice and Assistance

So how do you respond to such requests?

Similar to when refusing requests on cost grounds, provide as much evidence as possible in your refusal, with reference to the key elements I've just mentioned.

It's good practice to contact the requester with a view to supporting them refine their request when burden is the sole ground for not being able to comply as opposed to other vexatious elements.

We expect you to be able to demonstrate how you've supported the requester in this way should we receive a complaint.

Summary

To summarise:

Use the s12 cost provision in most cases, where the cost of location and extraction is the only the issue.

Reserve the s14 burden provision for requests that require a very significant effort beyond locating and extracting information.

For example: redacting exempt information in order to comply.

Remember, you should take account of the value of a request before rejecting it as burdensome. You don't need to do this if you're planning to rely on the s12 cost provision.

AND If you're frequently receiving burdensome or costly requests, consider a plan to proactively publish as much information as possible on the subject matter.

This isn't a magic bullet, but the less transparent you're about a subject, the more likely you're to receive related requests.

SLIDE 4

Any Questions on cost and burden before we take a look at some resources to support you?

SLIDE 5

Additional Resources to support you

Thanks for all the questions and comments. Let's now take a look at some of the additional resources from our Upstream Regulation Team to support you.

We set up the FOI Upstream Regulation Team just over two years ago to proactively support organisations with their FOI Practice.

This small team of five has produced a significant amount of additional resources to supplement our detailed FOI guidance.

I'm going to highlight just a few of these resources that I think will be useful for police authorities.

So, to get to our upstream resources page....open our website, scroll down to the section for organisations, and click of the Freedom of Information Tab.

I've picked out a number of resources according to subject matter to highlight. First...

Resource to Support You with Proactive Publication

mySocietyResearch: The outcome of our research with mySociety on the most commonly requested topics made via their request platform – WhatDoTheyKnow to help you with proactively publishing information on relevant topics. We analysed more than 150,000 requests in 2022 to come up with this list. We think it could help you target you proactive publication effort. The police sector isn't on the list, but some of the most common requests would be relevant to you.

Please have a read if you haven't.

DESCRIBE HOW TO FIND IT (FOI PAGE)

The next is...

Resource to Help You Keep up to date with case law

Newsletter: Learning points from our decisions and Tribunal decisions are available in our newsletter which has a regular FOI focus every three months. The newsletter also signposts you to changes to relevant Guidance. Worth subscribing if you haven't.

DESCRIBE HOW TO SIGN UP FOR THE NEWSLETTER (BOTTOM OF FOI PAGE)

Another resource in this space are...

FOI Webinars: where you can refresh knowledge and keep abreast of new developments in FOI.

DPPC- Our annual Data Protection Practitioners Conference is the most popular. We just had one a couple of weeks ago where we ran FOI sessions on handling requests for Environmental information, handling FOI requests & complaints made to the ICO. It's usually free and runs virtually so will cost you almost nothing to attend.

RECORDED SESSIONS ARE PUBLISHED ON OUR WEBSITE. LATEST SESSIONS ARE DUE TO BE PUBLISHED ON 22 OCTOBER.

You can access them by....

You should find them somewhere on this page once published.

Fivium/eCase – we also present at the regular Ecase FOI webinars. In the past we've spoken on a variety of topics, including exemptions on confidentiality and handling costly requests.

YOU CAN SIGN UP FOR THESE WEBINARS VIA THE FIVIUM WEBSITE. LOOK OUT FOR THEIR PROMOTIONAL CONTENT ON SOCIAL MEDIA, LINKEDIN PARTICULAR.

Next is...

Resource to Support you with Your FOI Practice

Case studies: We've worked with your fellow practitioners to produce and share how they do FOI within their organisations to support other

organisations with their FOI practice. Some of these practitioners were nominated or won awards at the FOI conference hosted by Ecase earlier this year in March.

DESCRIBE WHERE TO FIND CASE STUDIES

Learnings from Highly Performing Police authorities: we spoke to a number of highly performing police authorities about their FOI practice, and published what we found. We think this would be useful to other police authorities.

DESCRIBE WHERE TO FIND LEARNINGS (Learning Resources+Training videos link from FOI page)

FINALLY, worth mentioning, we have lots of other supportive resources you can access from our FOI page. For example:

OTHER RESOURCES

- self-assessment toolkits (including on handling costly and vexatious requests),
- guidance on exemptions,
- a quick FOI guide for less experienced staff,
- request handling templates and so on.

I won't be able to look at any of them in detail due to limited time, but please do take a look.

QUESTIONS OR FEEDBACK ON RESOURCES

ADVICE SERVICE: If you have any questions about these resources, please contact our advice service in the first instance.

SHARE ADDRESS ON THE SLIDE

FEEDBACK: We're constantly thinking of ways to help make FOI compliance less challenging for organisations and we welcome feedback on our upstream products.

You can share feedback on whether you've found any of our products useful or how they could be improved.

SHOW WHERE TO SHARE FEEDBACK

UPSTREAM FEEDBACK GROUP: You can also Join our upstream feedback group if you'd like to support our upstream work or if you're keen to collaborate in helping us develop new resources for FOI practitioners.

SHOW HOW TO JOIN UFG

END

AND that's all I have time for today. I'd be happy to take your questions.

Any questions?