

THE FREEDOM OF INFORMATION AND DATA PROTECTION (APPROPRIATE LIMIT AND FEES) REGULATIONS 2004

1. INTRODUCTION

- 1.1 Under the Freedom of Information Act 2000 (FOIA) a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the 'appropriate limit' prescribed in Regulations.
- 1.2 Section 9A of the Data Protection Act 1998 (inserted by FOIA) makes similar provision in respect of subject access requests for 'unstructured' personal information (i.e. manual records which are not held in a structured filing system).
- 1.3 The 2004 Regulations govern the 'appropriate limit' and the fees that can be charged for the above types of information requests.
- 1.4 There is no 'appropriate limit' for environmental information requests, however Regulation 8 of the Environmental Information Regulations 2004, provides for the recovery of 'reasonable' costs.

2. THE 'APPROPRIATE LIMIT'

- 2.1 Under the Regulations the 'appropriate limit' is set at £450 (£600 for central government and Parliament).
- 2.2 The 'appropriate limit' is calculated on a standard rate of £25 per hour based on estimating how long it takes to:
 - Determine if the information is held;
 - Locate the information or a document which may contain the information;
 - Retrieve the information, or a document which may contain the information; and
 - Edit or extract the releasable information contained within a document.
- 2.3 This calculation does not take into account the time spent/costs of:
 - Checking that a request for information meets the requirements of FOIA;
 - Locating information due to poor records management practice;

- Considering the application of exemptions, prejudice and/ or public interest tests;
- Obtaining legal advice;
- Obtaining authorisation to send out information;
- Calculating any fee to be charged; or
- Providing advice and assistance to the applicant for example in determining precisely what information they are seeking.

2.4 Based on the standard hourly rate of £25 the maximum time spent finding, retrieving, collating and editing before exceeding the £450 cost limit is 18 hours.

3. WHERE THE REQUEST FOR INFORMATION DOES NOT EXCEED THE 'APPROPRIATE LIMIT'

3.1 In determining whether the 'appropriate limit' is exceeded the cost of processing the request and communicating the information may be estimated in advance. In many cases, it will be immediately obvious that the request would cost less than the appropriate limit so there will be no point in calculating whether the 'appropriate limit' is exceeded.

3.2 If it is estimated that a request will take less than 18 hours to complete and there is no reason to withhold the information a public authority can not charge for the staff time spent undertaking the types of activity outlined in 2.2 above.

3.3 However the actual costs of communicating information released to the applicant are recoverable. This includes the cost of printing, photocopying, postage and/ or supplying the information in a particular form. The cost of informing the applicant whether the information is held can also be included. Authorities can charge for the actual costs incurred, but charges are expected to be reasonable.

3.4 The applicant must be issued with a Fees Notice and must pay the costs specified therein within a period of three months. A public authority is under no obligation to supply the information requested until the applicant has paid the requisite amount. If the costs are not paid within the three months timescale then the request lapses. The Fees Notice does not have to take a prescribed form.

3.5 Whether a charge is raised is entirely a decision for the council. This may be dependent upon the amount of information requested. Consideration could, for example, be given to fixing a minimum amount before disbursements will normally be charged. However, an authority's charging policy should be applied consistently and it is essential for details of that policy to be advertised openly so that applicants are aware in advance. The policy should be advertised in the usual way. There is again no prescribed format

3.6 It is important that any estimation is as accurate as possible. If the actual cost of answering a request turns out to be greater than the estimated cost charged, a council must bear the additional cost. There is no provision for a further Fees Notice to be issued. If the actual cost is lower than the amount charge the guidance is that consideration should be given to refunding the excess amount. A council may wish to set a minimum amount e.g. £5.00 before refund will be made.

4. WHEN THE REQUEST FOR INFORMATION DOES EXCEED THE APPROPRIATE LIMIT.

- 4.1 Public authorities are not obliged to respond to a request where it is estimated the cost of complying would be in excess of £450 and are entitled to:
- Decline requests exceeding this amount; or
 - Answer them and charge a permitted fee.
- 4.2 In the first instance, however, a public authority will always be expected to assist applicants to try and reframe their request with a view to bringing it under the 'appropriate limit'.
- 4.3 If an applicant does not accept advice and assistance and the cost continues to exceed the 'appropriate limit' a number of alternatives are then open to a council: -
- It may exercise discretion to supply some information up to the limit;
 - It is not obliged to comply with the request and can if it so chooses, turn the request down on the basis that it exceeds the limit or;
 - It may answer the request and may charge in accordance with the Regulations i.e. it can raise charges for staff time spent finding, retrieving, collating and editing information as well as disbursements.
 - It would be prudent to advise the applicant that the council intends to charge in full.
- 4.4 Where a request costs more than the appropriate limit to answer, there is no legal requirement to:
- Issue a Fees Notice;
 - Comply with the 20 working day time limit (see below)
 - Provide information in a preferred format.

However in the guidelines issued by the Department of Constitutional Affairs if a council chooses to answer a request exceeding the 'appropriate limit' it should endeavour to apply the same principles as if the request were below the limit.

(See <http://www.dca.gov.uk/foi/practitioner/feesguidance.htm>)

5. AGGREGATING REQUESTS

- 5.1 The Regulations provide for the costs of answering more than one request to be added together or aggregated for the purposes of estimating whether the 'appropriate limit' would be exceeded in relation to any one of the requests.
- 5.2 The Regulations state that requests can only be aggregated in the following circumstances:
- Two or more requests for information must have been made to the same public authority;
 - They must be either from the same person, or from different persons who appear to the authority to be acting together or in pursuance of a campaign;

- The requests must relate to the same or similar information; and
- They must have been received within a space of 60 consecutive working days.

5.3 This provision is designed to prevent individuals or organisations undermining the 'appropriate limit' by splitting a request into smaller parts. The guidance is that public authorities should exercise caution when considering whether requests should be aggregated. There should usually be strong grounds for believing that requests have been framed precisely in order to circumvent the appropriate limit.

6. TIME LIMITS & CHARGING

6.1 A council usually has 20 working days to respond to a request. The 20 working day period starts to run the day after the request is received.

6.2 If disbursement costs apply for responding to a request under the 'appropriate limit' an estimated Fees Notice should be issued.

6.3 Once the Fees Notice has been issued the clock stops and the applicant has three months to pay the charge. The request lapses after three months if the charge remains unpaid. Only when payment has been received and has cleared does the clock restart and work begin on collating the information. By way of clarification the clock starts running again from where it stopped, not back to the beginning of the 20 days.

6.4 It is recommended that ordinarily any Fees Notice be issued before any costs are incurred in preparing to answer the request.

7. DISBURSEMENTS & VAT

7.1 VAT – As the Act does not set a specific fee, any monies charged are not statutory fees.

7.2 Customs & Excise do not consider that information released under the Act constitutes an economic activity where the information could only be provided by a public authority. As such, any fees charged in these circumstances will be outside the scope of VAT. This means that no VAT should be added to the fees.

7.3 The key determining factor as to whether VAT is charged is whether the information is available from another source that is not a public authority.

7.4 Basically;

- If a council is asked for information, and the information is only available from the council or another public authority, any chargeable fees do not attract VAT.
- If a council is asked for information that is available from another non-public authority source any fees do attract VAT.

NALC is of the view that this principle also applies to information available through a council's Publication Scheme. It should be noted this does not accord with the guidance given by the Department of Constitutional Affairs.

8. INFORMATION NOT COVERED BY THE REGULATIONS

- 8.1 The Regulations do not apply to information readily available through a council's publication scheme or which is available under the terms of another Act.
- 8.2 Therefore, if a council made it clear that it intended to charge for supplying the information in its publication scheme, it can continue to raise charges for both staff time spent finding, retrieving, collating and editing the information, as well as disbursements. The charges must of course be "reasonable".
- 8.3 If information has to be provided under the terms of another Act, fees should be charged in line with the provisions in that Act.

9. FURTHER INFORMATION

This update is only intended to give a basic overview.

- 9.1 The Department of Constitutional Affairs has produced guidance on the Regulations which is available on its website at www.dca.gov.uk/foi/practitioner/feesguidance.htm.
- 9.2 Reference should be made to the same where clarification is necessary
- 9.3 A shorter summary of the guidance can also be found at <http://www.foi.gov.uk/practitioner/feesguidancesummary.htm>

This briefing was issued by Ian Mark, Senior Legal Executive