

EXPLANATORY MEMORANDUM TO THE

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

2004 No. 3244

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Freedom of Information Act allows the Secretary of State to make Regulations to prescribe an ‘appropriate limit’ and make provision for how it is to be calculated. Public authorities need not comply with information requests made under the Freedom of Information Act or subject access requests for ‘unstructured personal information’ made under the Data Protection Act, where these would cost more than the appropriate limit to answer.

2.2 The Freedom of Information Act also allows that fees can be charged for answering information requests, both when the authority must comply with the request because it costs less than the appropriate limit, and introduces new powers to charge where an authority chooses to answer requests costing more than the appropriate limit. These Regulations set out the maximum fee that can be charged in each case, and the circumstances in which charging is permissible.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative background

4.1 Section 12(1) of the Freedom of Information Act allows that public authorities do not have to comply with section 1(1) of the Act (that is, they can refuse to answer requests for information) if the cost of complying would exceed the “appropriate limit” prescribed in Regulations. Section 9A of the Data Protection Act 1998 (inserted by section 69 of the Freedom of Information Act) makes similar provision in relation to subject access requests to public authorities on “unstructured personal data”. Section 12(3) of the Freedom of Information Act allows the Secretary of State to make Regulations prescribing the appropriate limit, and that different amounts can be prescribed in different cases. Section 12(5) sets out that the Regulations may make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

4.2 Section 12(4) allows that where two or more requests for information are made to a public authority:

- by one person, or
- by different persons who appear to the authority to be acting in concert or in pursuance of a campaign,

the Secretary of State may prescribe by regulations circumstances where the requests can be aggregated for the purpose of estimating whether the appropriate limit has been met.

4.3 Section 9 of the Freedom of Information Act allows public authorities to charge a fee for answering requests made under section 1(1) of the Act, in accordance with conditions prescribed by Regulations (section 9(3)). Section 9(4) sets out that the Regulations may provide that no fee is payable in prescribed cases; that the fee is not to exceed such maximum as may be specified or determined in accordance with the Regulations; and that any fee is to be calculated in such a manner as may be prescribed by Regulations.

4.4 Section 13 provides a new power for an authority to charge a fee, calculated as prescribed by Regulations, for answering requests where this is not required by section 1(1) because the cost would exceed the appropriate limit as defined by Regulations made under section 12.

5. Extent

5.1 The Regulations apply to the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 Baroness Ashton has made the following statement regarding Human Rights: “In my view, the provisions of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 are compatible with the Convention rights.”

7. Policy background

7.1 The Freedom of Information Act 2000 provides for the right to make a request for information to a public authority. It entitles a person making such a request: (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him (section 1(1)). The Data Protection Act entitles a person making a subject access request to be informed whether personal data is held about them, and if so, to be given a description of that personal data, the purposes for which it is used, the recipients to whom it is disclosed, and the logic involved in any automated decisions. Section 1(1)(e) of the Data Protection Act 1998 (inserted by section 68 of the Freedom of Information Act), in conjunction with section 7 of the Data Protection Act allows individuals to make subject access requests to public authorities for a wider range of personal data.

7.2 Appropriate limit

Section 12(1) of the Freedom of Information Act allows that public authorities do not have to comply with section 1(1) of the Act (that is, they can refuse to answer requests for information) if the cost of complying would exceed the “appropriate limit” prescribed in Regulations. Section 9A of the Data Protection Act 1998 (inserted by section 69 of the Freedom of Information Act) makes similar provision in relation to subject access requests to public authorities insofar as these relate to “unstructured personal data”. These Regulations set an appropriate limit of £600 in both respects for authorities listed in Schedule 1, Part I of the Freedom of Information Act. Schedule 1, Part I of the Act covers any government department, the House of Commons, the House of Lords, the Northern Ireland Assembly, the National Assembly for Wales and the armed forces of the Crown. For all other public authorities, the appropriate limit is set at £450.

7.3 When calculating whether answering a request would exceed the appropriate limit, authorities can take account of the costs involved with determining whether it holds the information, locating and retrieving the information, and extracting the information from a document containing it. They cannot take account of any other costs involved with answering the request. For example they cannot include the costs associated with considering whether information is exempt under Part II of the Act. To the extent to which an authority may take account of staff time when calculating whether the appropriate limit is met, these costs must be estimated at a rate of £25 per person, per hour.

7.4 These Regulations apply to subject access requests only insofar as authorities can refuse access to ‘unstructured personal data’ where the cost of doing so is estimated to exceed the appropriate limit. They do not alter the fees that can be charged for subject access requests made under the Data Protection Act. Any fees that are charged for subject access requests, including for unstructured personal data, must be charged in accordance with the existing Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000. The other Regulations described below apply to the Freedom of Information Act only.

7.5 Section 12(4) of the Freedom of Information Act allows authorities to aggregate related requests for the purposes of calculating whether the appropriate limit has been met, in circumstances specified by Regulations, where two or more requests are received from one person, or from different persons whom the authority believes are acting together or as part of a campaign. These Regulations state that requests can be

aggregated when the two or more requests relate to the same or similar information, and when the requests are received within a period of sixty working days.

7.6 Maximum fee for complying with section 1(1) of the Freedom of Information Act

If an information request would cost less than the appropriate limit to answer, and there is no other basis on which it may be refused or otherwise dealt with, the authority is obliged to comply with section 1(1) of the Freedom of Information Act. Section 9 allows a fee to be charged in these cases, upon issuing the applicant with a Fees Notice. These Regulations prescribe the maximum fee that can be charged under section 9, although authorities may choose to charge a lower fee. The maximum that can be charged is the amount that the authority estimates it would reasonably incur in informing the applicant whether it holds the information, and in communicating the information to the person making the request. When estimating these costs, the authority cannot take account of any of the costs described in paragraph 7.3, including the time taken to assess whether information is held and to communicate it. Authorities may include in their cost estimates the cost of: providing the information in a format requested by the applicant (as described in section 11 of the Act); reproducing any document containing the information; and postage and other forms of transmitting the information.

7.7 Maximum fee for communication of information under section 13 of the Freedom of Information Act

Where a Freedom of Information request would cost more than the appropriate limit to answer, and the authority is not otherwise obliged by law to answer, section 13 of the Freedom of Information Act creates a new power for public authorities to charge a fee if they choose to answer. These Regulations prescribe the maximum fee that can be charged under section 13, although authorities may choose to charge a lower fee. The maximum fee is equivalent to the total of the costs that the authority estimates it will reasonably incur in:

- determining whether it holds the information, locating and retrieving the information, and extracting the information from a document containing it; and
- informing the applicant whether it holds the information and communicating the information to the person making the request. This includes the cost of the time taken to assess whether information is held and to communicate it.

Although under the Act requests may in some circumstances be aggregated for the purposes of calculating whether the appropriate limit is met, the authority must charge for each of these requests separately. If requests are made by different persons, each would be charged according to the cost of his or her individual request. If two or more requests are aggregated, and one or more of these requests has been already answered without charge by the time the requests are aggregated, the authority can only charge for those that have not yet been answered.

7.8 Consultation

The Government has consulted across Whitehall, and with the Lord Chancellor's Advisory Group on Implementation of Freedom of Information on its fees policy before making these Regulations. It also consulted with the Information Commissioner on the Regulations, as required by section 67(3) of the Data Protection Act. No formal consultation was held with the wider public sector, but the Government has discussed the policy with a range of public authorities through meetings with individual authorities, and seminars and conferences.

7.9 The Regulations will come into force on 1 January 2005.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact of these regulations on public authorities that have to respond to requests made under the Freedom of Information Act 2000 will depend on whether requests exceed the appropriate limit. If a request would cost less than the appropriate limit to answer, and there is no other basis for refusing or otherwise dealing with the request, authorities can only charge for complying with section 1(1) of the Act to the extent of the limited costs involved with informing the applicant whether the information is held and communicating it to the applicant. If a request would cost more than the appropriate limit, the authority could refuse to answer under section 12 of the Act, or charge for answering the request, subject to any applicable restrictions, under section 13 or under any other available power.

8.3 Public authorities have had four years to prepare for the implementation of Freedom of Information since the passage of the Bill in November 2000. The Government has always stated that the majority of costs would be met by the public purse, and the Government published draft fees Regulations at the time of the Freedom of Information Bill, illustrating this point. These Regulations also only allowed limited fees to be charged in circumstances where the appropriate limit was not met. Lord Falconer announced the broad outlines of the fees policy in October.

8.4 DCA has transferred funding of £9m in 2005-06 to ODPM for inclusion in the Revenue Support Grant to local authorities, to meet the costs of implementing the Freedom of Information Act.

9. Contact

Fiona Mongredien, in Information Rights Division, Department for Constitutional Affairs can answer any queries relating to the instrument. Tel 020 7210 8071, email fiona.mongredien@dca.gsi.gov.uk