



Department for Education

Freedom of Information Good Practice Visit Findings

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1. Background

Following discussions between Sir David Bell (Permanent Secretary Department for Education) and Christopher Graham (Information Commissioner) it was agreed that the Information Commissioner's Office (ICO) would conduct a good practice visit to the Department for Education (DfE) with a focus on Freedom of Information practices, policies and procedures. These discussions followed media coverage of the Department's responses to certain Freedom of Information requests related to correspondence between Special Advisers and Ministers. Allegations had been made that Ministers and Special Advisers were using private email accounts in attempt to circumvent the Freedom of Information Act.

As such, Louise Webb (Head of Good Practice) and Steve Wood (Head of Policy Delivery) met with Andrew Partridge (Information Rights Manager, Privacy and Information Rights Advisory Service) and Eve Trueman from the same team. Eve has responsibility for Internal Reviews, complaints to the Information Commissioner and Information Tribunal Cases.

The meeting was held on 25th October 2011 at the Department for Education, Sanctuary Buildings, London.

2. Scope

The agreed scope of the visit was to understand the Department for Education's policies, procedures and practices in relation to dealing with information requests in particular in relation to searching for information held under the FOI Act and the use of personal email and the scope of the FOI Act.

3. Summary of findings

The Department for Education have a number of policies, procedures and guidance notes which cover responses to Freedom of Information requests. A process is in place to ensure that correspondence to and from Ministers and Special Advisers is searched in response to requests where required. Furthermore, the Information Rights Team have demonstrated an understanding of the application of the FOI Act in the context of the use of private email accounts and there is evidence that this has been provided in advice and guidance since the allegations have been made.

However, it is not clear that this advice and guidance has been fully understood and followed by those covered by it. Once the Cabinet Office has issued new guidance DfE should issue further new guidance or update existing guidance to explain the legal position regarding private emails and FOI in more detail. This should be backed up with a commitment from senior management at DfE - to support the message that staff (in particular Special Advisers) may be asked to search their private email

accounts when there is a reasonable possibility that information relating to government business may be held. Senior management should also actively support a programme of training to raise awareness of this requirement and the associated issues.

Given the difficulty for civil servants and private offices to search private email accounts, and taking into account concerns regarding the security of these accounts and the need to ensure the completeness of the public record, the use of private email should continue to be actively discouraged. Where necessity prompts the use of private email for departmental business, DfE guidance should be clear that a departmental email address must be copied in to ensure the completeness of the department's records.

Civil servants can raise awareness of the need to search private email accounts and request that an individual undertakes a search of their account where reasonable but can only challenge those conducting the searches as to their completeness. They are not able to conduct these searches themselves. As such, steps need to be taken to ensure that the Information Rights team can be reasonably assured that all the required searches have been carried out. In order to achieve this, an audit trail should be kept and maintained for requests to search private email accounts to ensure all information covered by the scope of the request has been identified. In addition, DfE should allow the Information Rights team, with internal audit, security unit and IT colleagues as necessary, to conduct audits across the department, including within private offices, to ensure policies, procedures and guidance in relation to information rights is being followed in practice.

4. The FOI Act and the use of private email

For clarity, the Information Commissioner, in his guidance for the higher education sector ('Freedom of information legislation and research information: guidance for the higher education sector') has stated that:

Information held on personal, non-work email accounts (eg Hotmail; Yahoo; Gmail) can still be subject to disclosure under the legislation. Generally, if the information held on a personal email account is related to public authority business, it is likely to be held on behalf of the public authority in accordance with s3(2)(b) of FOIA. When searching for information in response to a request you should consider whether it is appropriate to ask a member of staff whether they hold information in a personal email account. If the information is not related to the public authority's work – considering the factors listed above, it will not be subject to the legislation. The ICO recommends that official work is stored on properly secure networks rather than personal email accounts.

Although produced for the HE sector this part of the guidance is applicable to any public authority.

With regards to information held in other forms, the ICO decision notice FER0289351 emphasises that the Act provides a right of access to information, irrespective of the form in which it is held. In this, the Commissioner states that:

A request may refer to information in a specific form, such as a particular written document, as a way of describing the information being sought. Where information is not in the possession of a public authority in the form that it is requested but it possesses the same information in a different form, then the requested information may still be held by the public authority for the purposes of the Act.

Section 84 of the Freedom of Information Act states "information" means information recorded in any form.

The ICO intends to publish guidance regarding official information held in private email accounts at the same time as this report.

The matters arising in this report are only those that came to our attention during the course of the good practice visit and are not necessarily a comprehensive statement of all the areas requiring improvement.

The responsibility for ensuring that there are adequate risk management, governance and internal control arrangements in place rests with the management of the Department for Education.

We take all reasonable care to ensure that our report is fair and accurate but cannot accept any liability to any person or organisation, including any third party, for any loss or damage suffered or costs incurred by it arising out of, or in connection with, the use of this report, however such loss or damage is caused. We cannot accept liability for loss occasioned to any person or organisation, including any third party, acting or refraining from acting as a result of any information contained in this report.