

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2021

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to matters of policy or practice. The MoJ ultimately refused to confirm or deny whether it held information within the scope of the request, citing section 12(2) (cost of compliance exceeds appropriate limit) of FOIA.
2. The Commissioner's decision is that the MoJ was entitled to apply section 12(2) of FOIA and that it has complied with the requirements of section 1(1) (general right of access) and section 16 (advice and assistance). However, she found a procedural breach of section 17(5) (refusal notice).
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 11 August 2020, the complainant wrote to the MoJ, making a multi-part request for information. It is accepted that this decision notice (DN) is only in relation to the MoJ's handling of those parts of that multi-part request where the complainant requested information in the following terms:

"I've been told that the courts have a policy or practice whereby any claims filed by a litigant in person which raise claims for breach of Human Rights Act 1998 are referred to a judge for review before being served. Please provide any records relating to this policy or

practice, including but not limited to records showing which statute, rule or practice direction provides for this departure from the normal process of serving claims; records showing what the purpose of this policy or practice and what options are available to a judge when such a claim is referred to them, other than to direct that the claim be served.

I've been told that the courts have a policy or practice of disregarding CPR [Civil Procedure Rules] 10.2 and CPR 12.3 and not actioning valid Requests for default judgment (which are ordinarily granted automatically by the court staff as an administrative decision if no acknowledgment of service or Defence has been filed and the time for doing so has expired) where a claim has been referred to a judge because it includes claims for breach of Human Rights Act 1998 and the judge has directed that it be transferred from the CCMCC [County Court Money Claims Centre] to another court office. Please provide any records relating to this policy or practice, including but not limited to records showing which statute, rule or practice direction provides for this policy or practice; records showing the reason for this policy or practice; records showing how a claim is expected to be dealt with if the court staff can't process a Request for default judgment because of this policy or practice but the claim can't be heard because the Defendant has decided to ignore the proceedings".

5. The MoJ responded on 3 September 2020. It refused to confirm or deny that it held the requested information, citing the following exemptions as its basis for doing so:
 - section 32(3) (court records) and
 - section 40(5) (personal information).
6. Following an internal review the MoJ wrote to the complainant on 1 October 2020, maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 2 October 2020 to complain about the way his request for information had been handled. He disputed the MoJ's application of exemptions, explaining that he considered that his request was for general policy documents, which do not relate to a specific case or contain any personal information.
8. By way of background to his request the complainant provided the Commissioner with a copy of various correspondence he had received from the MoJ.

9. In his complaint to the Commissioner, the complainant explained that his request followed on from earlier correspondence with the MoJ. However, while the complainant's internal review request letter referred to a previous MoJ letter, this was in relation to a separate matter.
10. The Commissioner pursued his investigation with reference to the wording of the request, ie on the basis that both parts of the request for information refer generically to "*the courts*" and that there is no reference in the request to previous correspondence from the MoJ.
11. As is his practice, the Commissioner wrote to both parties at the start of his investigation. He invited the MoJ to reconsider its handling of the request for information, particularly in light of the complainant describing the requested information in his correspondence to the Commissioner as "*general policy documents, which do not relate to a specific case or contain any personal information*".
12. Having revisited the request, the MoJ confirmed that it was no longer relying on sections 32(3) and 40(5). It issued a revised response to the complainant in which it said:

"I can confirm that the MoJ holds the general policy information that you have requested, and I have provided it below".
13. The MoJ provided the Commissioner with a copy of '*the full disclosure reply*' that it had sent to the complainant.
14. The complainant remained dissatisfied. He considered that the revised response had not provided any of the documents or records which he had requested.
15. He also rejected the MoJ's assertion that he clarified the request in his complaint to the ICO and that, prior to that, it was not apparent that he was seeking documents relating to a general policy or practice.
16. The Commissioner continued with his investigation, asking the MoJ to provide context to the information that was disclosed and asking it to confirm whether, with reference to the wording of the request, the MoJ holds further information within the scope of the request. He asked the MoJ to write to the complainant accordingly if further information was held.
17. The MoJ sent further correspondence to the complainant, dated 25 August 2021, clarifying its earlier response to his request for information. In that correspondence, the MoJ told the complainant:

"No further information is held that can be disclosed to you. ... There may be some court level processes only, held by each

individual court, but searches for that information instead, would fall under Section 12(1) (costs) exemption of the FOIA”.

18. The complainant wrote to the Commissioner confirming that he was dissatisfied with the MoJ's further correspondence and that he disputed the MoJ's application of section 12(1). In his correspondence, the complainant set out the chronology of his request and complaint. He requested a DN and explained what actions he considered the Commissioner should take in order to conclude matters.
19. At a later date, on 17 November 2021 and 18 November 2021 respectively, the MoJ wrote to both the Commissioner and the complainant, clarifying that it considered that section 12(2), rather than 12(1), of FOIA applied in this case.
20. The Commissioner recognises that public authorities have the right to claim any exemption (including section 12 or section 14) or exception for the first time before the Commissioner or the Tribunal. This is subject only to the Tribunal's case management powers. The Commissioner does not have discretion as to whether or not to consider a late claim.
21. The Commissioner acknowledges the complainant's concerns about the investigation process. However, it is a matter for the Commissioner to determine, on a case-by-case basis, the appropriate way to progress an investigation in accordance with section 50 of FOIA.
22. With respect to the concerns raised by the complainant which are the subject matter of this DN, the analysis below considers the MoJ's application of section 12(2) of FOIA to the requested information.
23. The Commissioner has also considered whether the MoJ complied with sections 1 (general right of access), 16 (advice and assistance) and 17 (refusal of request) of FOIA.

Reasons for decision

Section 12 cost of compliance exceeds appropriate limit

24. Section 1(1) of FOIA states that:

"(1) Any person making a request for information to a public authority is entitled –

- (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."

25. Section 12(1) of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

26. Section 12(2) of FOIA states that:

"Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

27. The appropriate limit in this case is £600, as laid out in section 3(2) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). This must be calculated at the rate of £25 per hour, providing an effective time limit in this case of 24 hours work.

28. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. However, there is no statutory requirement under section 17 for the refusal notice to include an estimate of the costs involved, or any other explanation of why the cost limit would be exceeded.

29. The Commissioner acknowledges that the MoJ told the complainant that his request had been asking for *"general overall agreed policies held on this issue"*. With regard to the discretionary element about when to refer a case to a judge, it told him:

"... Local policies may exist to assist new, or inexperienced staff, to plug a gap, given there is no national guidance, or with the direction of the local leadership judiciary. This is enabled by and is not contradictory to the provisions contained within CPR 3.2".

30. It further explained:

"... In this instance to determine if all of the information requested is held, including any local policies, and answer a question on how the general overarching processes, are specifically interpreted in each court, that would require contacting 95 county courts. Each court would need to identify if there are any local practices in place for processing a claim under the Human Rights Act..."

31. While the MoJ did not provide the complainant with an estimate of the work involved in establishing whether it held information within the

scope of his request, it did provide an estimate, of £1,187.50, to the Commissioner and explained how it had arrived at that figure.

32. The issue for the Commissioner to decide is whether the cost estimate was reasonable. If it was, section 12(2) is engaged and the MoJ was not obliged to confirm or deny whether the requested information was held.

Would confirmation or denial exceed the appropriate limit?

33. In estimating whether complying 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.

34. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.

35. In its submission to the Commissioner, the MoJ told him:

"The request has been interpreted as asking for general overall agreed policies held on this issue".

36. It confirmed that to answer a question on how the general overarching processes are specifically interpreted in each court would require contacting 95 county courts. The MoJ estimated that this would take around 47.5 hours, based on an estimate of approximately 30 minutes for each court to confirm if they have any local practices and search their records to obtain any guidance documents. At the rate of £25 per hour, the estimated cost, therefore, was £1,187.50.

The Commissioner's view

37. By virtue of section 12(2) of FOIA a public authority is not required to comply with the duty in section (1)(1)(a) of FOIA (ie to confirm or deny whether the requested information is held) if to do so would exceed the appropriate limit.
38. The Commissioner acknowledges that the complainant believes that the MoJ is able to supply the information he has requested. He accepts that, in correspondence with the Commissioner about the MoJ's application of section 12, the complainant made reference to specific courts within the

court system, arguing that it would not exceed the section 12 limit for the managers of those courts to provide relevant information.

39. However, as noted above, the Commissioner has taken into account that the request for information did not name any specific courts: rather, it referred to 'the courts' generically.
40. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether the public authority can confirm, within the appropriate costs limit, whether information falling within the scope of the request is held.
41. Therefore, as set out in the Fees Regulations, the Commissioner has considered whether the estimated cost of responding to the request would exceed the appropriate limit of 24 hours.
42. The Commissioner recognises in his guidance *'Requests where the cost of compliance exceeds the appropriate limit'*¹:

"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. However, it must be a reasonable estimate".
43. In accordance with the Information Tribunal, the Commissioner considers that a reasonable estimate is one that is:

"...sensible, realistic and supported by cogent evidence".
44. In this case, the MoJ explained that it would be necessary to contact 95 county courts in order to establish if the requested information was held. It also explained why it considered that it would take 30 minutes of staff time per court to carry out the activities required to ascertain whether it held relevant information.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

45. The Commissioner is satisfied that, given the wording of the request, the MoJ has identified that it is necessary to contact the county courts about this matter.
46. With regard to the activities required, the MoJ described the need for staff at each court to conduct searches of their local computer, and of paper documents if necessary, and to extract and collate the information before returning it.
47. Even if the MoJ's estimate of thirty minutes per court was excessive, from the evidence he has seen during the course of his investigation about the number of courts involved and the steps required to confirm if they have any local practices and search their own records to obtain any guidance documents, the Commissioner is satisfied that the MoJ has demonstrated that it would exceed the appropriate limit of 24 hours to determine whether the requested information is held.
48. Section 12(2) does therefore apply and the MoJ is not required to comply with the request.

Section 16 advice and assistance

49. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request "*so far as it would be reasonable to expect the authority to do so*".
50. In general, where section 12 is cited, in order to comply with this duty, a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner recognises that where a request is in excess of the limit, it may not be practical to provide any useful advice.
51. In this case, the MoJ advised the complainant it may be able to able to answer a refined FOI request within the cost limit. In that respect, it told him:

"You may wish to consider, for example submitting a new FOI request, asking for information on local policies, but from only a few specific courts, and during a specific and short time period, which could reduce the volume of the request".

52. In the circumstances of this case, the Commissioner is satisfied that the MoJ fulfilled its duty at section 16(1) of FOIA to provide advice and assistance as far as is reasonable.

Section 1 general right of access

53. As noted above, section 1 of FOIA relates to the two separate duties to confirm or deny that information is held (1(1)(a)) and to communicate the information (1(1)(b)).

54. However, sections 12(1) and (2) state:

"(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit".

55. In light of the Commissioner's finding above, that the MoJ is not required to comply with the request by virtue of section 12(2), the Commissioner does not find a breach of either section 1(1)(a) or 1(1)(b).

Section 17 refusal of request

56. Section 17(5) of FOIA states:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact".

57. By failing to provide a refusal notice citing section 12(2) within the required timeframe, the Commissioner finds a breach of section 17(5).

Other matters

The Section 45 Code of Practice

58. The section 45 Code of Practice² (the Code) provides guidance for public authorities on best practice in meeting their responsibilities under Part I

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

of FOIA. The Code should be used as a handbook which sets out best practice to help with the day-to-day handling of requests.

59. The Commissioner recognises that adhering to the Code will result in positive benefits for the public authority, and in practical terms, offer good customer service.
60. The Code is designed to help a public authority understand its obligations under FOIA. These benefits are interlinked, and a public authority will obtain most benefit by adhering to all aspects of the Code. Adhering to the Code should result in positive benefits for the authority and will help it to provide good customer service.
61. The Commissioner recommends the section 45 Code of Practice to the MoJ, noting the particular relevance of the following topics in the circumstances of this case:
 - Advice and assistance
 - Internal Reviews
 - Cost limit
62. The Commissioner acknowledges the complainant's concerns with regard to the way the internal review was conducted.

The internal review

63. In this case, the complainant clearly disagreed with the MoJ's handling of his request. When requesting an internal review, the complainant told the MoJ:

"The first two parts of my request are for records relating to matters of policy or practice, not for court records relating to a specific cause or matter or which would identify any individuals. So s32(3) and s40(5) FOIA, which you have relied on, are inapplicable."

64. The Commissioner cannot consider the quality of the internal review process in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice (the Code) issued under section 45 of FOIA.
65. Section 5.9 of the Code sets out that the public authority:

"... should in all cases re-evaluate their handling of the request, and pay particular attention to concerns raised by the applicant".

66. The Commissioner considers that the MoJ's correspondence to the complainant, in response to his request for an internal review, did not conform to the Code in that it did not address the specific concerns he raised.

Right of appeal

67. 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

68. 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.
69. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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