

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2014

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

Decision (including any steps ordered)

1. The complainant requested information relating to Judicial Review (JR) applications, in particular applications which are Aarhus Convention claims. The Ministry of Justice (MoJ) considered the request in accordance with the FOIA and applied section 12 (cost of compliance exceeds the appropriate limit).
2. The Commissioner's decision is that the FOIA was the appropriate access regime in this case and that MoJ correctly applied section 12 of FOIA. However, he considers that it failed to comply with its obligation under section 16 of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance under section 16 FOIA to enable her to make a refined request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The requested information in this case relates to applications for Judicial Review in England and Wales. The Judicial Review Claim Form - Form N461 - contains a section that provides for the applicant to state whether the claim is an Aarhus Convention claim.

6. The Aarhus Convention is an international agreement, part of which sets out the obligations of the signatories in terms of providing access to environmental information.

Request and response

7. On 5 May 2014 the complainant wrote to the MoJ and requested information of the following description:

"1. The number of applications for Judicial Review in England and Wales made since 1st April 2013 which have been identified on Form N461 as Aarhus Convention claims;

2. The number of applications in question (1) that have been successfully challenged by the Defendant as Aarhus Convention claims (if any);

3. The number of applications in question (1) that have been granted permission to proceed;

4. The number of applications in question (1) that have been successful for the claimant;

5. The average time taken for cases under (1) to be concluded; and

6. The number of applications for statutory review which have been subject to the costs limits within CPR 45.43".

8. The MoJ responded on 30 May 2014. It advised the complainant that it had handled her request under FOIA as it does not consider the requested information to be environmental information. It refused to provide the requested information, citing section 12 of FOIA (cost of compliance exceeds appropriate limit) as its basis for doing so.
9. The complainant requested an internal review on 2 June 2014. The MoJ sent her the outcome of its internal review on 27 June 2014, upholding its original position.

Scope of the case

10. The complainant contacted the Commissioner on 21 July 2014 to complain about the way her request for information had been handled.

11. She disputed that the MoJ had considered her request for information under the correct access regime. In her view, MoJ should have considered the request under the Environmental Information Regulations 2004 (EIR) – not FOIA. She told the Commissioner:

"..the MoJ has drawn an erroneous distinction between 'the detail of' the Aarhus Convention claims and 'statistical information' about such claims.... No distinction is or should be made between detailed information and statistical data".
12. In the event that the MoJ was correct to consider the request in accordance with the FOIA, she disputed its application of section 12 to the requested information.
13. The Commissioner will consider whether the request of 5 May 2014 should have been handled under the EIR or FOIA, and, if FOIA, whether the MoJ was entitled to apply section 12.

Reasons for decision

14. The EIR provide public access to environmental information held by public authorities. Derived from European law, they implement the European Council Directive 2003/4/CE on public access to environmental information (the EC Directive) in the UK.
15. The first issue for the Commissioner to decide is whether the requested information falls within the definition of environmental information.

Is the information environmental?

16. Information is environmental if it meets the definition set out in regulation 2(1) of the EIR which states:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other

releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)".

17. In correspondence with the complainant, MoJ said that the requested information is not environmental information. It explained:

"This is because the information is statistical data about the Judicial Review (JR) process for a type of application which relates to the environment, (so while the detail of each application may qualify to be handled under the EIR, statistical process information - such as the number of cases or the success rate - does not)".

18. In response, the complainant told the MoJ that, in her view, the identification of a claim as an 'Aarhus claim' on the claim form:

"..represents an administrative measure designed to enable claimants to bring environmental cases and thus help protect the environmental factors listed in Regulation 2(1)(a) and (b). As such, information relating to the number of claims for Judicial Review that have benefitted from Aarhus costs protection (and the relative success rate of those cases), is covered by Regulation 2(1)(c) and is thus environmental information under the EIR".

19. In bringing her complaint to the Commissioner's attention, the complainant said:

"Aarhus Convention claims are clearly measures or activities affecting or likely to affect the elements and factors referred to in

Regulation 2(1)(a) and (b). Accordingly, any information on such claims falls within Regulation 2(1)(c) EIR”.

20. The Commissioner considers that to be defined as environmental information under 2(1)(c):
- the information itself must be **on** a measure or an activity; and
 - the measure or activity (not the information itself) must affect or be likely to affect the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
21. In other words, for the information to be environmental information under 2(1)(c) the measure must link back to the elements of the environment under 2(1)(a).
22. The Commissioner acknowledges that the list used to define the term ‘measures’ is not exhaustive. He also acknowledges that the use of the word ‘on’ indicates a wide application:
- “and will extend to any information about, concerning, or relating to the various definitions of environmental information”.*
23. In reaching a decision in this case, the Commissioner has consulted his published guidance about environmental information¹ which states:
- “Because the EIR stem from a directive to be implemented throughout Europe, their interpretation is helped by considering that their main aim is to contribute to a greater awareness of environmental matters by providing greater access to information about our environment”.*
24. The Commissioner understands that, in the context of the request in this case, the requested information relates to the number of JR applications of a type that relates to the environment, the average time taken for such cases to be concluded and the number of applications for statutory review subject to particular cost limits.
25. In the Commissioner’s view, while the subject matter of the JR applications themselves may relate to environmental information, that

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Introductory/EIR_WHAT_IS_ENVIRONMENTAL_INFORMATION.ashx

does not mean that the requested information comprises environmental information.

26. Having considered the wording and context of the request in this case - and the purpose of the regulations - he does not consider that the requested information constitutes 'information on' in the context of regulation 2. In his view, the requested information does not comprise measures affecting or likely to affect the elements and factors referred to in (a) and (b) or measures designed to protect those elements.
27. As the EIR cannot therefore apply, the Commissioner has gone on to consider the MoJ's application of section 12 of FOIA.

Section 12 cost of compliance exceeds appropriate limit

28. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit.
29. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case.
30. In correspondence with the complainant the MoJ confirmed that it held information within the scope of the request. However, it told her that complying with that part of the request would exceed the cost limit.

Would complying with the request exceed the appropriate limit?

31. In correspondence with the complainant, MoJ confirmed that claimants tick the relevant box on Form 461 to indicate that the claim is an Aarhus claim. However, MoJ told the complainant that complying with her request would require "a review of extensive numbers of manual files" explaining that the information is not collected centrally. It subsequently clarified its response, estimating that it would have to search and assess approximately 400 files "at an estimated cost in excess of £800".
32. During the course of his investigation the Commissioner asked MoJ to provide him with a detailed estimate of the time/cost taken to provide the information falling within the scope of this request. In its substantive submission, MoJ confirmed that to identify whether Aarhus has been cited as grounds for the JR can only be established from the file itself. It provided the Commissioner with an estimated cost of £1,791,000 to comply with the request, the estimate being based on the results of a sampling exercise.

33. That estimate shows that the majority of the effort would be with respect to the checking of each of the hard copy case files of the estimated 400 cases to see if the Aarhus claim box has been ticked and then checking on the relevant IT system to see what happened on the case.
34. From the evidence he has seen during the course of his investigation, the Commissioner is satisfied that the MoJ has provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and the MoJ is not required to comply with the request.

Section 16 advice and assistance

35. Where a public authority claims that section 12 is engaged, it should, where reasonable, provide advice and assistance to help the requestor to refine the request so that it can be dealt with under the appropriate limit.
36. In this case, MoJ provided the complainant - on a discretionary basis - with a link to published statistics. It told the Commissioner that such information "*may have been helpful*" to the complainant. However, it acknowledged that it failed to provide more specific advice in relation to narrowing the request to bring it within the cost limit.
37. In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:
 - either indicate if it is not able to provide any information at all within the appropriate limit; or
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requestor to make a refined request.
38. In this case, although MoJ invited the complainant to submit a refined request it failed to provide her with an indication of what information could be provided within the appropriate limit.
39. The Commissioner therefore considers that the public authority has not met its duty to provide relevant advice and assistance.

Right of appeal

40. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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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