

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2016

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

Decision (including any steps ordered)

1. The complainant requested information about the application of an amnesty dated April 2008 under the terms of which the Ministry of Justice (MOJ) did not seek repayments of certain monies previously paid on account to qualifying providers of legal aid services.
2. The Commissioner's decision is that MOJ does not hold any recorded information beyond that provided to the complainant and so had complied with section 1(1) FOIA.
3. The Commissioner does not require MOJ to take any steps to ensure compliance with the legislation.

Request and response

4. The information request was made within the context of a so-called amnesty, the terms of which were set out in a Deed of Settlement dated 1 April 2008 between the Law Society and MOJ (the amnesty), (<https://www.lawsociety.org.uk/support-services/advice/articles/lscs-recoupment-of-payments-on-account-and-nil-assessment-policy/>) offered by MOJ to qualifying providers of legally aided law services. Under the terms of the amnesty, MOJ agreed to not seek repayment of certain historical payments on account of monies paid to qualifying service providers. MOJ say that the complainant's law firm did not qualify to benefit under the terms of the amnesty, something which he does not accept.

5. On 3 July 2015 the complainant wrote to MOJ and requested information in the following terms:

"Question

- a) A number of law firms offered the said amnesty were prior thereto sent requests to repay (as described above) the said payments on account.*
- b) A number of law firms are refused the said amnesty who prior to the time of it were sent requests (as described above) to repay the said payments on account, in respect of which law firms*
- 1) No payment has been made by the LAA [Legal Aid Agency] to the law firm (including its predecessors if relevant) since 31 Mar 2002; and*
 - 2) There had been no activity on the Legal Aid Certificate since 31 Mar 2002; and*
 - 3) The total payments on account did not exceed £20,000 net of Vat; and*
 - 4) No agreement had been made by the law firm (including its predecessors if relevant) to repay to or allow the LAA to recoup payments on account made prior to 31 Mar 2002.*

The LAA are required to provide information describing and explaining (including illustrated by documentation as appropriate) their administrative practice and/or mechanism by which the law firms in (a) above (that is [within] 5587 in number) have been offered the said amnesty whilst the law firms in (b) above (number unknown but believed to be a relatively small minority) have been refused the said amnesty.

And in the case of discrimination between (a) and (b) the LAA are required to explain and justify their conduct. If the LAA are unwilling to answer this FOIA request, they are respectfully requested, whether they view it as ex gratia or otherwise, to grant me the benefit of the amnesty for which I am willing, if requested, to agree a confidentiality agreement."

6. MOJ responded to the 3 July 2015 information request on 30 July 2015 and said that the information requested was not held, a decision that MOJ confirmed to the complainant following an internal review.

Scope of the case

7. The complainant contacted the Commissioner on 5 October 2015 to complain about the way his request for information had been handled.

8. The matter is of long standing and has involved the complainant in a long drawn out dispute with MOJ and some of its executive agencies. For clarity, the Commissioner refers to 'MOJ' throughout this notice.
9. MOJ told the Commissioner by way of background that it had previously identified a number of historic publicly funded cases where the provider firm had received legal aid payments on account, but no final claim had been submitted. MOJ said that following judicial review proceedings, a deed of settlement had been agreed between itself and the Law Society whereby cases which met certain criteria were subject to a payment "amnesty" of 8 April 2008 (the amnesty). As a result, provider firms of solicitors could elect to either accept the unrecouped payments on account as final remuneration for their work in the affected matters, or opt to submit their final claim for consideration by the LSC, enabling payments on account to be recouped and a balancing final bill paid.
10. The Commissioner has previously issued a decision notice in respect of a closely connected section 12(1) FOIA matter, his reference FS50538948. The complainant appealed the Commissioner's decision to the First-tier Tribunal (Information Rights), case reference *Merrick v Information Commissioner & MoJ EA/2014/0283*. In April 2015, just before the date set for an oral hearing, MOJ agreed by way of compromise to advise the complainant that:

"at least some of those law firms subsequently offered the amnesty were sent requests for payment (of outstanding payments on account) prior to the amnesty of 8th April 2008. In saying this, we are not saying that there were not significantly more than some, but that it would involve us in an excessive FOIA cost to research the necessary information which would show whether or not that was so".

On receiving this information from MOJ, the complainant withdrew his appeal.

11. The Commissioner noted that the correspondence containing the information request extended beyond merely asking for recorded information in saying: "... *in the case of discrimination between (a) and (b) the LAA are required to explain and justify their conduct ...*". As that wording is not a request for recorded information, it is not covered in this notice.
12. The Commissioner has considered representations from the complainant and MOJ together with the answers provided by both parties to questions he put to them. He then considered whether, on a balance of probabilities, information falling within the scope of the request was held by MOJ at the date the request was made.

Reasons for decision

13. Section 1(1) of the FOIA provides that:

"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."

14. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or did hold it at the time of the request).

The complainant told the Commissioner in his representations that it was impossible to conceive that MOJ had no information to show why its computer system had sent offers based on the amnesty to some law firms but not others when their circumstances were the same. In particular, he said, both groups had received requests for payment. The complainant maintained that MOJ should have in its records notes and minutes of its relevant decisions.

MOJ said that it had carried out reasonable and adequate targeted searches for the requested information. The following MOJ departments had been consulted:

- The LAA's Central Legal Team (previously known as the 'Corporate Legal Team'), who represented the MOJ in drafting the amnesty,
- The LAA's Debt Recovery Unit responsible for recovering the monies owed as a result of unbilled cases,
- The Manager of the Unrecouped Payments on Account team at the LAA responsible for administering the original amnesty exercise.

MOJ added that if it had held the information sought by the complainant, it would have been held by one of those departments.

15. In this matter, MOJ confirmed to the Commissioner that it does not hold any further recorded information in addition to that that has already been disclosed to the complainant. MOJ added that no recorded

information by way of explanation or guidance illustrating the mechanics of the application of the amnesty existed outside of the April 2008 deed of settlement.

16. The complainant told the Commissioner that the consequences of his being refused the benefit of the amnesty were so serious that a higher standard of proof than the balance of probabilities should exceptionally be applied because that test was not, he said, proportionate to the issues involved. However, the Commissioner's approach in cases where there is a dispute between a public authority and a requester as to whether information is held is as set out above. This is applied in every such and he saw no reason to depart from that approach here.
17. On the basis of the representations provided by both parties, and particularly the explanation and assurances from the MoJ of the searches it carried out and the absence of any evidence suggesting that further recorded information is held, the Commissioner found, on a balance of probabilities, that MOJ had complied with section 1(1) FOIA.

Right of appeal

18. 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

19. 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.
20. 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

Jon Manners
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