

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **25 July 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 number of complaints made in relation to courts losing correspondence. Following clarification of the request, the Ministry of Justice (the 'MOJ') advised that the requested information is not held. During the Commissioner's investigation, the MOJ revised its position to also rely on section 12, the cost exclusion of FOIA.
2. The Commissioner's decision is that, on the civil balance of probabilities, no electronic information is held. He also finds that the MOJ was correct to rely on section 12 in respect of any manually held information. However, as the MOJ failed to respond to the clarified request within 20 working days, it breached section 10(1) of FOIA. The Commissioner does not require the MOJ to take any remedial steps to ensure compliance with the legislation.

Request and response

3. On 10 May 2015, the complainant wrote to the MOJ and requested information in the following terms:

"After discussions with the Parliamentary and Health Service Ombudsman, it has been decided that information relating to the number of complaints which have been made in relation to the courts losing correspondence is now required..."

4. The MOJ asked the complainant to clarify her request on 3 June 2015. It asked her to provide the specific dates she required the information for,

the specific court(s) her request relates to and exactly what she meant by the courts '*closing*' correspondence (the latter was a misread of the original request which quite clearly states that the complainant was referring to '*losing*' correspondence).

5. The complainant provided that clarification on 28 August 2015, as follows:

"...information relating to the number of complaints which have been made in relation to the courts LOSING correspondence is now required..."

...specific dates and courts required, I wish to further clarify that, first and foremost, as much information requested over as wide a time as is possible to be accessed and obtained in respect of information held on your computer systems, emails and information which is held centrally and within central records..."

...searches of the regional offices and courts – including Plymouth County Court – can then be commenced...

...I also formally request that you provide advice and assistance to enable me to yet further clarify or rephrase my requests, inform me what options would be available to me..."

6. On 1 October 2015 the MOJ (Her Majesty's Courts and Tribunals Service 'HMCTS') responded. It denied holding the requested information but provided advice and assistance about what information is held on the computer system known as 'CAFÉ', confirming that any report generated from that system would not identify how many pieces of correspondence were specifically lost by the courts, and gave the complainant a link to some published MOJ overall statistics.
7. The complainant requested an internal review on 13 November 2015 and asked three further questions, namely:

"1. According to the Knowledge and Information Liaison Officer, no paper records have been searched and that, therefore, the search is incomplete.

2. Furthermore, two categories of complaints recorded on the CAFÉ system have already been identified and it is, therefore, possible that these can be interrogated.

3. For further clarification, the information requested can also include delayed items which have been or could have been classified as lost and that papers sent to the wrong address can also be treated as such."

8. The MOJ sent the outcome of its internal review on 30 December 2015. It upheld its original position and provided responses to the three additional questions as follows:

"1. There are no paper records; all complaints are recorded on the electronic CAFÉ system.

2. I have confirmed with the Data Quality team that though they are able to produce ad hoc reports by searching for key phrases recorded in some 'free text' fields; it would require the person recording the complaint to use this exact phrase; this would be inconclusive to your request.

3. Delayed items – though data is held on 'delayed items' it is not possible to ascertain which have been or could have been classified as lost. As your Freedom of information request was treated as 'courts losing correspondence' being correspondence received by the court; providing you with data relating to 'data loss – wrong address' would be treated as a separate request under the Act. I'd be grateful if you could confirm [whether] you wish to make a new request for this information."

Scope of the case

9. The complainant contacted the Commissioner on 7 April 2016 to complain about the way her request for information had been handled.
10. Although the MOJ initially told the complainant it did not hold the requested information, the Commissioner learned that it had, in fact, written to the complainant on 5 May 2016, citing section 12, cost. Neither the public authority nor the complainant brought this to the Commissioner's attention until he discovered a reference to it during his investigation. Having requested and secured a copy of the section 12 letter of 5 May 2016, the Commissioner has considered whether the MOJ was correct to rely on section 12 in relation to part of this request. He will also consider whether, on the balance of probabilities, any information is held on the relevant computer system.

Reasons for decision

Section 1 – general right of access

11. The Commissioner will first consider whether the MOJ holds any information electronically.

12. Section 1 of the FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and if so, to have that information communicated to them.
13. The Commissioner is mindful that when he receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
14. As part of his 'information not held' investigation, the Commissioner asked the MOJ about the searches it had undertaken in order to respond to the complainant's request. It advised that it had searched the CAFÉ system, which is the only system currently used to record any complaints made to HMCTS.
15. In addition, the MOJ said that all CAFÉ categories were checked using a general reporting function, in order to establish whether there was a category relating to the specifics of the request. Having sought advice from the HMCTS Customer Service team, the MOJ identified that there are two 'issue types' on the system under which this kind of complaint may be entered, namely:

'Data Loss' – which includes papers sent to the wrong address, details or documents from an unrelated case which have been disclosed to a third party and lost files/papers.

'Delays in dealing with correspondence' – which includes time taken for letters, emails or faxes to be answered, delays in correspondence moving between teams/offices/Judiciary an documents not linked to a file.

16. As a result, the MOJ advised that it is not possible to confirm which category would have been used for a complaint regarding courts 'losing' correspondence, explaining that it is possible that either of these categories may have been used.
17. The MOJ explained that additional information relating to each complaint can be included on CAFÉ using a free text box; however, it stressed that any ad-hoc search conducted would not find reliable or conclusive data because the result would be reliant upon the search terms used being exactly the same as those used for the original inputting of the complaint.

18. The MOJ confirmed that an overview of all complaints received is held electronically on the CAFÉ system - which has been in use since 2002 - together with details of how many complaints have been recorded against each CAFÉ category. It also explained that the specifics of each complaint would be held in manual complaint files which it retains for three years (or five years in the case of financial matters) in accordance with HMCTS retention schedules.
19. The Commissioner is satisfied that the CAFÉ system is not structured in such a way that it records information in the categories requested by the complainant and he accepts that the requested information is therefore irretrievable. However, from the MOJ's explanation above, it is clear to him that whilst the requested information is, on the balance of probabilities, not held electronically that some information could be held in the manual complaint files. The MOJ also reached this view, having "reassessed" its response; it advised that it could have refused the request under section 12 (cost of compliance) even if it had limited its search to Plymouth County Court (the only specific court referred to in the request). Using the five year retention period for manual complaint files at Plymouth County Court, the MOJ considers that this search would have exceeded the cost limit of £600.
20. Accordingly, the MOJ wrote to the complainant on 5 May 2016 to explain that the information she had requested is not held electronically but may be held in hard copy files, but that to ascertain whether this is the case would exceed the cost limit set out in section 12 of FOIA. The Commissioner has therefore considered the MOJ's reliance on section 12.

Section 12 – cost of compliance

21. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
22. 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 of 24 hours' work.
23. When estimating whether disclosing the requested information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in disclosing the information. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.

24. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
 - determining whether the information is held;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.
25. Due to the MOJ's retention periods of three years, or five years if related to financial issues, it said it would not be possible to answer the request based on the suggested timeframe of January 1991 to November 2015. This is because the information is not held electronically (for the reasons already explained in this notice) or manually for the whole of this time period (because some files will have been destroyed in line with the MOJ's retention schedules).
26. The MOJ therefore looked at the period of the complainant's request where information may be held on manual files, currently May 2011 (the oldest records available at the time of drafting this notice) to November 2015 (the date of the request).
27. In the period May 2011 to November 2015, 428 complaints were recorded on CAFÉ by Plymouth County Court. It estimated that a manual check of all of the complaint files held in this timeframe would take 5136 minutes or 85.6 hours to assess each file, based on an estimated 12 minutes per file which includes the time to manual retrieve the file, checking the contents and noting the information provided.
28. The cost limit of £600 would therefore be exceeded (equivalent to 3.5 working days' worth of work, calculated at £25 per hour and based on a 6 hour working day) to identify, locate, extract and then provide the information that has been asked for.
29. The Commissioner notes that even if the time to check each file was halved to 6 minutes, it would not bring the request within the cost parameters.
30. It is also of note that it was not definitively established whether the complainant only requires the requested information for Plymouth County Court. If she required details for other establishments then this would obviously be substantially more onerous to provide.

Conclusion

31. From the information provided, the Commissioner has concluded that the MOJ was correct to rely on section 12 in relation to this request.

Section 16 - advice and assistance

32. If a public authority estimates that the cost of determining whether or not information is held would be above the appropriate limit, it is not required to conduct searches but should consider providing advice and assistance.
33. In this case, the MOJ has suggested that the complainant may wish to refine her request, for example, by further limiting the time period. In doing so it complied with its duties under section 16. It also explained that even a refined request may not fall within the prescribed cost limit.

Section 10 – time for compliance

34. Under FOIA, a public authority has 20 working days following the date of receipt of a request in which to respond. In this case, although the MOJ initially responded within that timeframe to seek clarification of the request, in line with section 1(3) of FOIA, it then failed to provide a response to the clarified request within 20 working days, thereby breaching section 10(1) of FOIA.

Other matters

35. As well as finding above that the MOJ is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the MOJ should evidence from other cases suggest that there are systemic issues within the MOJ that are causing delays.
36. The Commissioner notes that the clarification provided by the complainant does not include the requested timescale and location of the information the complainant is seeking. He would suggest that any subsequent request for this information is very specific in terms of location and, based on the numbers of files/complaints held manually, narrow in timeframe.
37. The Commissioner would remind the MOJ to keep him informed if it changes its stance partway through the investigation of a complaint; in this case the MOJ altered its position from the information not being held to section 12 and informed the complainant of this on 5 May 2016. However, the Commissioner did not know until he received the MOJ's

investigation response of 6 June 2016, the vast majority of which was dedicated to the information not being held electronically, with only a passing reference to section 12 towards the end.

Right of appeal

38. 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

39. 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.
40. 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

**Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**