

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to a specified Employment Tribunal Judgement. The Ministry of Justice (MoJ) denied holding the requested information.
2. The Commissioner's decision is that the information sought by the complainant is not held by the MoJ for the purposes of FOIA and that the MoJ is entitled to rely on section 3(2)(a) (public authorities) of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 7 May 2023, the complainant wrote to the Employment Tribunals Service and requested information in the following terms (numbers added for reference):

"Please provide the following subject to Section 1 of the Freedom of Information Act 2000.

 1. A copy of judgment [judgement number redacted] that has been removed from the Employment Tribunal register.
 2. Any document held that might explain the reasons for the failure to record this case on the register.

3. A copy of the audio of the original reasons given orally, in which the Employment Tribunal determined that a Non Disclosure Agreement signed by Employee Representatives would not prevent consultations taking place.
4. A copy of the Judges notes for this case.
5. A copy of the Non Disclosure Agreement, if held by the Tribunal signed by employee representatives.
6. A copy of the ET1 and original grounds, alongside any amendments permitted to made to [sic] the ET1, and any additions or substitution of claimants".
5. The MoJ sought clarification on 17 May 2023.
6. The complainant explained that the information they are seeking relates to an Employment Tribunals Service Judgement.
7. The MoJ provided its substantive response on 5 June 2023. It explained that the information is not held by the MoJ and so is not subject to FOIA.
8. The complainant requested an internal review on 5 June 2023, specifying that they would like the Employment Tribunal to deal with the matter.
9. Following the Commissioner's intervention, the MoJ provided its internal review on 22 August 2023. It maintained its position, providing further explanation in support of its view that it does not hold the requested information.

Scope of the case

10. Following earlier correspondence, the complainant wrote to the Commissioner on 22 August 2023 about the handling of their request. They were dissatisfied that the employment tribunal itself had not responded to their request.
11. In other correspondence, while acknowledging that matters have progressed since the time of their request and original complaint, the complainant told the Commissioner that they accept that the Employment Tribunal Service has two separate functions - as Public Authority and as a Tribunal - and therefore some of the requested information may not be 'held'.

12. However, they said they would like to focus on one area, namely the information in scope of part 2 of the request. In later correspondence, they included the information in scope of part 5 of the request.
13. The Commissioner recognises that the complainant would like the body to whom they made the request to respond, and not the MoJ. In that respect, the Commissioner accepts that the complainant addressed their request for information to "Dear Employment Tribunals Service" and asked to be provided with information under FOIA.
14. Part I of FOIA provides for the general right of access to recorded information held by public authorities and specifies the conditions which need to be fulfilled before an authority is obliged to comply with a request.
15. The Employment Tribunals Service is not listed as a public authority in schedule 1 to FOIA. However, it is administered by HM Courts & Tribunals Service (HMCTS). HMCTS is an executive agency of the MoJ and falls within its remit for the purposes of FOIA. MoJ is therefore the appropriate public authority in this case.
16. The Commissioner recognises that the complainant has kept him informed of events that have taken place since they made their request. In the course of that correspondence, the complainant also raised a number of issues which are outside the scope of the Commissioner's remit.
17. While he accepts that the complainant considers that the information they are seeking must exist, the Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.
18. In light of the above, the analysis below considers whether, the MoJ holds information of the description specified in parts (2) and (5) of the request for the purposes of FOIA (section 3(2) of FOIA).
19. The Commissioner has addressed the matter of the advice given by the MoJ to the requester in 'Other matters' below.

Reasons for decision

Section 1 general right of access to information held by public authorities

20. Section 1 of FOIA states:

- “(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.”

Section 3(2) – information held by a public authority

21. Section 3(2) sets out the circumstances in which information is considered to be ‘held’ for the purposes of FOIA:
- “For the purposes of this Act, information is held by a public authority if—
- (a) it is held by the authority, otherwise than on behalf of another person, or
 - (b) it is held by another person on behalf of the authority.”
22. The Commissioner interprets the phrase “otherwise than on behalf of another person” to mean that a public authority holds information for the purposes of the FOIA if it is held to any extent for its own purposes.
23. The Commissioner’s guidance¹ ‘Information you hold for the purposes of FOIA’ makes it clear that whether information is held by a public authority, or is held on behalf of a public authority, depends on the facts of the case.

The MoJ’s position

24. In correspondence with the complainant, the MoJ confirmed that, having conducted thorough and reasonable searches, HMCTS/the MoJ do not hold any information within the scope of the request within its capacity as a public authority.
25. In its submission to the Commissioner, the MoJ explained what it had told the complainant, namely that HMCTS functions in more than one capacity - one as a tribunal officer, when conducting business for the

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/>

tribunal (under the direction of the tribunal), and the other as a public authority (such as reporting and analytics of court and tribunal services).

26. It explained the steps that were taken, when the request was received, to determine if information was held by Watford Employment Tribunal and, if so, if it was held for its purposes (in its tribunal capacity), or by HMCTS (and by extension the MoJ) for its public authority purposes.
27. Acknowledging that FOIA is legislation applying to the information held by public authorities for their public authority functions, the MoJ confirmed to the Commissioner that it does not hold information within the scope of the request.

The Commissioner's view

28. It is not in dispute that the MoJ is a public authority for the purposes of FOIA. It is also well established that courts and inquiries are not subject to FOIA, as is recognised by the Commissioner in his guidance².
29. The Commissioner acknowledges that the MoJ's position is that FOIA only applies to the information held by public authorities for their public authority functions: it does not apply to courts and tribunals. As such, information held by the courts, or held by a public authority on behalf of a court, is not within the scope of the Act.
30. He also accepts that the requested information is of interest to the complainant, that the complainant considers that the information must exist and that documents held by the court and 'considered behind closed doors' should be made available under FOI if requested.
31. However, from the evidence he has seen, and in accordance with his published guidance, the Commissioner is satisfied that the MoJ does not hold recorded information within the scope of parts (2) and (5) of the request in its capacity as a public authority.
32. It follows that he is satisfied that the MoJ does not hold information for the purposes of FOIA and that the MoJ was entitled to rely on section 3(2) to refuse the request.

² <https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

Other matters

33. The Commissioner recognises that both in the initial refusal and internal review, the MoJ advised the complainant that it is open to them to redirect their query to the relevant Employment Tribunal as they may hold some of the requested information.
34. The MoJ also advised that information the Tribunal holds must be disclosed under the procedural rules.

Right of appeal

35. 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

36. 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.
37. 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

Michael Lea
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF