

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 October 2008

Public Authority: Ministry of Justice
Address: Selborne House
54 Victoria Street
London
SW1E 6QW

Summary

On the 3 October 2005 the complainant requested information in relation to action taken by the Department of Constitutional Affairs now the Ministry of Justice ('MOJ') regarding judicial misconduct. The Ministry of Justice initially refused the information but did not give the complainant a reason under the Freedom of information Act 2000 ('the Act'). They later released some information requested by the complainant but refused the remainder under section 12 (1) of the Act. The Commissioner concluded that the Ministry of Justice has breached section 10 (1), section 17 (5) and section 17 (7) in relation to their handling of this case, but have correctly applied section 12 (1) to the remaining information.

The Commissioner's Role

1. 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 1 of the Act. This Notice sets out his decision.

The Request

2. On the 3 October 2005 the complainant requested the following:

"Further to my previous request, as permitted under the Freedom of Information Act 2000, please could you provide the following details:-

1. *Regarding the 273 cases taken forward for investigation, what 'personal conduct' prompted further investigation (e.g. 5 judges used profane language etc.);*

2. Regarding the 4 cases where further action was taken, what further action was taken (e.g. 1 Judge was sacked etc...)

Please note that I am not making request for any personal details, as I appreciate I am not entitled to them, but I am asking for summary information which your Department clearly holds and is in the public interest."

3. On the 9 November 2005 the complainant re-sent a copy of his request to the MOJ.
4. On the 1 December 2005 the complainant emailed the MOJ having not received any response.
5. On the 13 January 2006 the MOJ wrote to the complainant, stating that it had not received the request dated 03 October 2005 but understood a copy had been sent on the 9 November 2005. In its response the MOJ directed the complainant to their website for further information surrounding his request. The MOJ advised the complainant that section 139 of the Constitutional Reform Act 2005, places a duty of confidentiality on the Lord Chancellor and the Lord Chief Justice in handling conduct or discipline issues. The MOJ did not claim any specific exemptions under the Act. The response did not advise the complainant as to how to request an internal review if he was dissatisfied with the response. The response did not contain the particulars advising the complainant of the right to complain to the ICO as at section 17 (7) of the Act.
6. On the 22 February 2006 the complainant requested a review of the MOJ's decision, claiming that the section 139 confidentiality clause did not apply to his request. The MOJ responded on the 17 March reiterating to the complainant that he needed to 'be aware' of section 139 of the Constitutional Reform Act 2005. Again the MOJ did not apply any exemptions under the Act in this correspondence.
7. On the 28 March 2006 the complainant replied to the MOJ asking them to further consider what was actually requested.

The Investigation

Scope of the case

8. On 2 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated to the Commissioner that he had requested information but this was refused.
9. Following the intervention of the Commissioner the MOJ released information to the complainant in relation to part 2 of his request. On the 27 September the MOJ informed the Commissioner and the complainant that they were relying on section 12 to exempt part 1 of his request. The complainant confirmed to the Commissioner that he was satisfied with the MOJ fulfilling part 2 of his request

but wished him to consider the refusal of part 1 of the request on the grounds of cost.

Chronology

10. Following the commencement of the Commissioner's investigation, the MOJ in their correspondence dated 27 September 2007 released information in relation to part 2 of the complainant's request. The remainder of this decision notice deals with part 1 of the complainant's request.
11. The MOJ sought to rely on section 12 (1) of the Act, stating that it estimated the cost of complying with the request would take them over the appropriate fees limit. The MOJ wrote to the complainant to confirm their reliance on section 12 of the Act. The Commissioner questioned the MOJ on their application of section 12. The Commissioner specifically referred the MOJ to regulation 4 of the Freedom of Information and Data Protection (Appropriate Limit And Fees) Regulations 2004 regarding the matters which the MOJ may consider when it estimates whether the costs of complying with a request would exceed the appropriate limit.
12. In its correspondence of the 7 December 2007, the MOJ provided the ICO with a breakdown of the estimated costs for complying with this request. MOJ confirmed that an annual report for 2003/4 detailing outcomes for the Judicial Correspondence Unit (JCU) had enabled the MOJ to confirm previously to the complainant that 273 cases were taken forward for further investigation. MOJ stated that the annual report for that year recorded case outcomes, monthly figures for investigations, refusals and withdrawn cases provided by individual case workers at the time. The report did not give any supporting information detailing the actual case names and numbers which make up those figures, nor did it give details or case numbers of the complainants. MOJ stated that the 273 cases covered by the complainant's request were those concluded in the period April 2003 to March 2004. (The annual report was based on figures for the financial year 2003-04). MOJ stated to the Commissioner that there was no identifiable link between the annual report 2003/4 financial year, which was produced and the database of information, which records cases on receipt and in calendar years. The 273 cases are those concluded in the period April 2003 to March 2004. MOJ stated that they would need to check the 2002 database, the 2003 database and the first three months of the 2004 database (as all of these databases covered the period relating to concluded cases, which the Annual Report of 2003-4 was based upon) which would take an estimated 211 hours just to determine whether a summary of the information in relation to these cases is held on the database and inputted into a different log. MOJ would then need to search through the paper files covering the period January 2002 to March 2004 in order to supply the complainant with a comprehensive account of the information sought in all of the 273 cases. The 273 files were amongst 2531 stored files. MOJ estimated to the Commissioner that this would take 422 hours to extract the information from the manual files in order to answer this request.
13. In order to fully consider the entirety of the information held by MOJ the Commissioner inspected information in relation to this request at the office of the MOJ in London on the 4 January 2008.

14. **Background to the request.**
15. The complainant had requested information as to the personal conduct that prompted 273 cases investigated by the JCU in 2003/4. The JCU was the predecessor of the Office for Judicial Complaints ('OJC'). The OJC was set up in April 2006 under the Constitutional Reform Act 2005, and handles complaints made against members of the judiciary in England and Wales and some judicial office holders who sit in Tribunals in Scotland and Northern Ireland and the complaints are handled in accordance with the Judicial Discipline (prescribed procedures) Regulations 2006 (SI 2006/676). Before the OJC complaints of judicial misconduct were dealt with by the JCU, an office within the former Department of Constitutional Affairs. The complainant's request relates to information held by the former JCU and specifically to the financial year 2003/4.

Analysis

Procedural matters

Section 10

16. Section 10 of the Act requires that a public authority must comply with section 1 (1) promptly and in any event no later than the twentieth working day following the date of receipt. The wording of section 10 is set out in the attached legal annex. The complainant made his request on the 3 October 2005. MOJ stated that they did not receive this request, although the complainant resent his request on the 9 November 2005. The Commissioner has taken the request of the 9 November as having been received by MOJ. The Commissioner has noted that MOJ only responded to the complainant on the 13 January 2006, over 20 working days following receipt. The Commissioner therefore finds that the MOJ have not complied with the statutory time limits set down in the Act.

Section 12

17. Section 12 states

“(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 “
18. The appropriate limit for a central government department is £600 as set by the Freedom of Information and Data Protection (Appropriate Limit and fees) Regulations 2004 ('the Fees Regulations'). The MOJ have estimated that the time spent on responding to the request in this case would have been 211 hours

reviewing the electronic databases and 422 hours searching through the manual paper files to provide the complainant with the information sought in relation to the 273 cases.

19. The Commissioner considers that it is up to the public authority to estimate whether it would exceed the costs limit to comply with a request. However their estimate must be reasonable. To this end the Commissioner can investigate for himself the way in which the estimate has been determined. The Tribunal in the case of Mr William Urmenyi and the London Borough of Sutton v the Information Commissioner(EA/2006/0093), para 16 states

“... the Commissioner and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commissioner and the tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority's expectation of the time it would take to carry out the activities set out in regulation 4 (3) a-d must be reasonable. “

20. Paragraph 4 (3) of the Fees Regulations sets out the activities that may be taken into account when formulating a cost estimate. These activities are as follows
- determining whether the information is held
 - locating the information
 - retrieving the information, or documents in which it is contained
 - extracting the information from documents in which it is contained.
- The Fees Regulations state that the cost a public authority can take into account when estimating how much they would be expected to spend on those activities should be judged at a rate of £25 per person per hour.
21. In its correspondence to the Commissioner of the 7 December 2007, the MOJ stated that there were two possible ways to obtain the information sought by the complainant. The first was a trawl of the judicial complaints database and the second was a search through the paper files pertaining to the years covering the complainant's request. MOJ stated to the Commissioner and confirmed as a part of his inspection that it no longer held the monthly reports that the 2003/4 Annual report was based upon. The Commissioner therefore inspected two electronic databases held by the JCU as well as viewing the stored manual paper files for the years relating to the complainant's request. MOJ confirmed to the Commissioner in its correspondence of the 07 December 2007 that there was no identifiable link between the Annual Report of 2003/4, which was produced and the database of information, which records cases on receipt and in calendar years. MOJ confirmed to the Commissioner that the 273 cases were concluded in the period April 2003 to March 2004. MOJ stated that to find the 273 cases requested they would first need to check the 2002 database, the 2003 data base and the first 3 months of the 2004 database.

The Electronic Databases.

22. The MOJ confirmed to the Commissioner that there were two electronic databases held relating to the time period covering the complainant's request.

MOJ confirmed there were no other bespoke databases held in relation to this complaint. Upon reviewing both databases the Commissioner concluded that neither electronic database could provide the information in relation to the complainant's request.

The First Database consisted of an excel spreadsheet monitoring the numbers of cases assigned to each case-officer who then worked in the JCU. It recorded cumulative casework totals for each month. At a glance a case-manager would be able to ascertain how many cases were received, how many cases an officer had completed, and how many they were still investigating. There were no details as to what a case was about or what 'personal conduct' was being investigated. The Commissioner concluded that this database would not provide the information required to respond to the complainant's request as this information had not been input into the MOJ database and could not be retrieved. The Commissioner considers that the information sought in the complainant's request was not held in this particular database operated by MOJ.

The Second Database

23. The second database, an excel spreadsheet was also a case management tool used by the JCU for monitoring workloads and the stage which each complaint had reached. The database held details on when the complaint was received, who had complained, which judge was being complained about and action taken on the case. The Commissioner noted that there were no categories of information relating to the nature of the complaint and therefore no direct method of providing the information in relation to the complainant's request. The Commissioner noted the presence of a 'comments section' in this database. The comments section was not filled in for all cases and on inspection the Commissioner noted its purpose appeared to be an aid for internal caseworkers in the JCU. The comments noted items such as warnings if the complainant was judged by the JCU as difficult to deal with. It was not a commentary on what a case was about. The Commissioner considered that this 'comments' section could not be used to discern what a case was about or indeed what action prompted further investigation of the case. The Commissioner concluded after looking at all of the categories of information on this second database, that it could not be used to provide the information sought by the complainant.

The Commissioner concluded that the information requested by the complainant was not held on the electronic databases. The Commissioner also concluded that the 273 cases in question could not be identified from an interrogation of the electronic databases. He concluded that the 273 files which contained this information would have to be manually checked for the personal conduct reason which was not included in the electronic databases. From the electronic databases there was no way in which the '273 cases that resulted in further investigation' could be singled out or indeed set aside by a reference number or other identifier to enable a quicker cross-check of the manual files. The Commissioner therefore proceeded to view the manual files held for the period covered by the individual's request.

The Manual Files and the Central Correspondence Unit.

24. The Commissioner noted whilst inspecting the second electronic database that some of the cases were referenced with file numbers although again not all. Staff assisting the Commissioner with his inspection explained that when correspondence was received by the JCU, it was either sent directly to the JCU or it was sent to them by the Central Correspondence Unit (CCU). When a document arrived at the CCU, the name of the complainant and his or her address would be logged on a computer and a reference number would be generated. Post would then be sent out from the CCU to its destination within the MOJ. In the case of the JCU, when a file was completed by a case-officer it was sent back to the CCU for storage. No files were retained by case-officers at the JCU, except in very rare circumstances, such as their being the subject of a judicial review. If a closed file was needed, a caseworker could then request the file by giving either a reference number (if it was known) or the name and address of the complainant. The MOJ confirmed to the Commissioner that as the electronic databases did not contain file references for all of the cases a manual search would need to be carried out of all of the paper files stored for the years in question. MOJ also confirmed to the Commissioner during his inspection that whilst all of the names and addresses of the complainants could be looked up on the computer in the storage area of the CCU (known as the Ministerial Correspondence Unit), all of the entries for the years in question would have to be checked manually to verify the accuracy of the detail in question. The computer storing the information was not designed for high speed searching and a separate list would have to be compiled of the information generated. Once all of the files from the JCU for the years covering the complainant's request were found they would have to be manually searched to determine which were the files relating specifically to his request. The MOJ confirmed to the Commissioner in their correspondence of the 7 December 2007, that there are over 2531 files relating to the years covering the request. To manually check each of these files (MOJ estimate an average of 10 minutes per file) would account for 422 hours of staff time.
25. The Commissioner inspected a sample of files from 2003 stored by the MOJ. The archivist at MOJ explained to the Commissioner that each file contained 10 pieces of correspondence filed in chronological order. Each file was given a reference number and each piece of correspondence a subset of that reference number. As the correspondences were filed in chronological order, each manual file had 10 pieces of unrelated correspondence in it. The Commissioner noted that there would be no way to conclude from taking a sample file from any given year what was contained within it. A search of the computer would only reveal the name and address of a complainant and a reference number for their correspondence. On merely looking at a file there is no way of knowing what would be contained within this file. He considers that 10 minutes would be a likely period of time for inspecting each of the files that had been JCU files for each of the years covered by the complainant's request in order to ascertain which were the files that related to the request. The Commissioner has therefore concluded after viewing the manual files that such a manual search of the files in question would take the MOJ well over the appropriate limit of £600, as it would take one

researcher more than 24 hours to go through all the files in question to determine which files were pertinent to the complainant's request.

26. The Commissioner therefore concludes that the MOJ were entitled to apply section 12 of the Act and were also correct to estimate that the time spent and resulting cost in complying with the complainant's request would take them over the appropriate limit of £600.

Section 17 (5)

27. Section 17 (5) as detailed in the attached legal annex, requires a public authority which is applying section 12 of the Act to provide the complainant with a notice under section 17 within the time set out for complying with section 1 (1) of the Act. For the reasons set out at paragraph 16 above the Commissioner has taken it that MOJ received the complainant's request on the 09 November 2005. MOJ did not inform that complainant that it was applying section 12(1) of the Act until the 27 September 2007, well over the time for complying with the duty set down in section 1(1) of the Act. The time for complying with the duty at section 1(1) can be found at section 10 of the Act and as detailed in paragraph 16 above. The Commissioner accordingly finds that MOJ have breached section 17 (5) of the Act.

Section 17 (7)

28. Section 17 (7) as detailed in the legal annex requires a public authority refusing to release information to inform the complainant of any internal procedure it has in place for dealing with requests for information. It also requires that a public authority inform an individual about any right conferred by section 50 of the Act, i.e. the right of appeal to the Information Commissioner. The MOJ did not include any of this detail in its letter of the 13 January 2006 to the complainant. The Commissioner duly finds the MOJ in breach of section 17 (7) of the Act.

The Decision

29. The Commissioner's decision is that the MOJ failed to comply with section 10 of the Act in that it did not respond to the request within 20 working days of receipt.

The Commissioner also concludes that MOJ have failed to comply with section 17 (5) of the Act in that they did not within the time for complying with section 1 (1) of the Act give the applicant a notice stating that fact. The Commissioner also finds that MOJ breached section 17 (7) of the Act in not conveying the particulars and rights of appeal to the complainant when refusing his request.

However the Commissioner further concludes that the public authority dealt with the request in accordance with section 12 of the Act

Steps Required

30. The Commissioner requires no steps to be taken.

Other matters

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern: Whilst inspecting the manual files held by the MOJ as a part of this request the Commissioner is concerned that information held by the MOJ may be being kept for longer than is necessary. Stored correspondence viewed by the Commissioner dated back over 5 years. There is no way for the MOJ to know definitely what is stored in any one of the many thousands of files held by them or indeed what is the appropriate level of security for any given document. The only apparent way to search a file is by reference number (if known) or by name and address to ascertain a piece of correspondence sent in by an individual. The MOJ stated to the Commissioner during his inspection that a review of all of the stored files is being planned, although a date has not been set for such a review. The Commissioner is concerned that if a stored manual file is requested by a department within the MOJ, the employee requesting the file would not only have access to the one piece of correspondence he had requested, but also 9 other pieces of unrelated correspondence. This other correspondence may in some instances contain sensitive personal data as defined by section 2 of the Data Protection Act 1998. The Commissioner has concerns that if information is stored for longer than needed the MOJ may be in breach of its own retention and disposal policies. The Commissioner is also concerned that in the case of correspondence containing personal data or indeed sensitive personal data, there may be a risk that information is being processed in a manner incompatible with the requirements of the DPA. The Commissioner is aware that MOJ now has a corporate file plan and offices within the MOJ such as the JCU now have ownership of their own files. The Commissioner however has concerns that for the older manual files, such as those stored for the years relating to the complainant's request, that information may no longer be needed by the MOJ and they could therefore be in breach of the fifth data protection principle.

Right of Appeal

31. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of October 2008

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 10(1)

“Subject to subsection (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 12

Section 12 (1) provides 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.

(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”

Section 17 (5)

“ 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.”

Section 17 (7)

“ A notice under subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Article 4 ‘The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004’

4. - (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.