

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 05 May 2011

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

Summary

The complainant requested information about cases heard by a deceased chairman of the Edinburgh Employment Tribunals. The public authority refused the request under section 12(1) of the Act on the grounds that the costs of locating, retrieving and extracting the information would substantially exceed the appropriate limit. While the Commissioner accepted that to comply with the request would exceed the costs limit, he found that the public authority's refusal notice failed to properly explain that it was unable to confirm whether it held some of the requested information without exceeding the costs limit.

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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Tribunals Service, as an executive agency of the Ministry of Justice, is a public authority for the purposes of the Act and provides the administrative support to Employment Tribunals, which are independent judicial bodies.

The Request

3. On 23 March 2010 the complainant made the following request for information:

"In the Edinburgh Employment Tribunals,

- 1) How many employment tribunals did Mr Mark Sischy chair between 1 May 2004 and 31 July 2006?*
 - 2) On what dates did Mr Mark Sischy preside as Chairman over employment tribunals between 1 May 2004 and 31 July 2006?*
 - 3) How many judgments did Mr Mark Sischy make between 1 May 2004 and 31 July 2006?*
 - 4) What are the names of the claimants and respondent in the cases which Mr Sischy chaired between 1 May 2004 and 31 July 2006?"*
4. The request was submitted to the Ministry of Justice, the public authority in this case, but the initial response, dated 20 April 2010, was received from the Tribunals Service, which is an executive agency of the Ministry of Justice.
5. The Tribunals Service issued a refusal notice stating that in order to provide the requested information, the Department would have to compile the data manually by examining the Public Register of Judgments in Glasgow and collating the data. It estimated that it would take in excess of 3½ working days to locate, retrieve and extract the information and provided a calculation in support of its claim.
6. The Tribunals Service therefore refused the request under Section 12(1) of the Act (albeit it failed to specify that it was subsection (1) that applied). It advised the complainant that he was at liberty to inspect the Register of Judgments himself by visiting the Glasgow office. It also directed him to the website of the Employment Appeal Tribunal, which publishes any judgments it issues in response to appeals against Employment Tribunal rulings. It advised the complainant that it was possible to search those judgments using the search terms set out in his request and that he might find some of the information he was seeking there.
7. However, the Tribunals Service then went on to state that it was possible that it no longer held some of the requested information. It explained that Employment Tribunal casework records are routinely destroyed twelve months after the date of any judgment, except where

a judgment is appealed. In such cases the records are retained for two years from the date of the judgment or until the appeal process has been completed, whichever is the longer. As such, it was possible that casework records dating back to the period 2004-2006 would have been destroyed.

8. Having suggested that the requested information could be obtained from the public Register, the Tribunals Service did not clarify precisely what information it was claiming might not be held, or offer any explanation as to why it could not check whether the information was held.
9. On 20 April the complainant asked for the decision to be reviewed. He stated his belief that a personal file on Mr Sischy containing the information he required must exist and be held by the Edinburgh Employment Tribunals. He expressed the view that he was being deliberately obstructed from obtaining the information.
10. On 14 May 2010 the Tribunals Service responded, upholding its handling of the request. It explained that the public Register of Judgments was not searchable either by presiding Judge or date of judgment. It stated that it was "highly unlikely" that any casework records dating back to 2004-2006 were still held. It also stated that it did not hold any files which contained details of the cases that had been heard or dealt with by individual judges.
11. It also advised the complainant that refining his request was unlikely to bring it within the scope of the cost limit set out at section 12. By way of example it provided a calculation in respect of judgments for a reduced period of 2004/2005, which would require 15 working days to fulfil.

The Investigation

Scope of the case

12. On 14 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He restated his belief that the information he required must exist and be held separately from the public Register.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
14. The Commissioner wrote to the Ministry of Justice on 12 October 2010 requesting further information about the time calculations it had provided. He asked whether an individual file was held in respect of Mr Sischy and for a description of the information it contained. He also

asked for a copy of any guidance, procedural policy document or deletion schedule in respect of the stated policy of destroying files after twelve months and for the circumstances in which such a file might be retained.

15. The Ministry of Justice replied on 3 November 2010. It answered the Commissioner's questions and provided a copy of the Employment Tribunals procedures regarding the retention and disposals of files. It clarified that the public Register only contained information about cases where a judgment was issued. If Mr Sischy had presided over cases which did not result in a judgment being issued (for example, where a case was settled or withdrawn before the hearing concluded, or where the pre-Tribunal hearing resulted in a decision to proceed otherwise than to a final hearing) records pertaining to them would not be contained in the public Register.
16. The Commissioner understands that information about such cases would have been held in casework records and that this is the information which the Tribunals Service suggested might no longer be held.
17. The Commissioner wrote again to the Ministry of Justice on 9 November 2011, asking whether any investigative or disciplinary files existed in respect of Mr Sischy for the period 2004-2006, and if they did, whether they contained any information about individual Tribunals.
18. The Ministry of Justice replied on the 3 December 2010. It explained that the Judicial Office held a personnel file, but that it contained five pieces of routine paperwork relating to the date of Mr Sischy's retirement, and no records of an investigative or disciplinary nature. It restated its belief that it had conducted quite extensive searches in response to the request as a result of which it was satisfied that the Ministry of Justice did not hold other sources for the information.
19. On 7 February 2011 the Commissioner wrote to the Ministry of Justice pointing out that, according to its own retention and disposal policy, it was possible that some casework records from the period specified by the complainant had been retained. He asked whether it was possible to search the electronic casework management system to identify cases where Mr Sischy was the presiding judge.
20. The Ministry of Justice replied on 16 March 2011 explaining that to do this would exceed the appropriate limit. It supplied calculations in support of its claim.

Chronology

Analysis

Substantive Procedural Matters

Section 12

21. The investigation established that there are potentially two sources for the information sought by the complainant: the public Register of Judgments (which lists only those cases where a judgment was issued) and the Tribunal's case management system, which might conceivably hold casework files dating back to 2004-2006, although the Commissioner accepts that if held, the number of such records would be low.

Section 12 - Cost of compliance exceeds appropriate limit

22. Section 12(1) states:

'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.'

23. Section 12(2) provides that:

'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.'

24. Section 12(3) states that:

'In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.'

25. Accordingly, section 12 provides that a public authority is not obliged to comply with a request for information if it estimates that meeting the request, or even just establishing whether or not the requested information is held, would exceed the appropriate cost limit. The appropriate limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). The cost limit for a central government department such as the Ministry of Justice is currently set at £600 and equates to 3½ days work or £25 per hour.

26. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
- determining whether it holds the information;
 - locating the information or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
27. Section 12 makes it clear that a public authority does not have to make a precise calculation of the costs of complying with a request. Only an estimate is required. However, the estimate must be reasonable and can only be based on the four activities identified above.
28. The Ministry of Justice stated that the information which related to issued judgments could be obtained from the public Register of Judgments. The Register is a manual register, containing written details of judgments issued by the Employment Tribunals. It is supported by an electronic index, but this is not searchable by either presiding Judge or dates of judgments.
29. Consequently, the Commissioner accepts that the only way the Ministry of Justice could locate, retrieve and extract the requested information would be to conduct a manual search of the entire Register for the years specified, collating the requested information as it was encountered. The Ministry of Justice said that this would exceed the appropriate limit for dealing with requests.
30. The Ministry of Justice provided the following calculation in support of its claim:

2004/2005

- 7,000 claims submitted, an estimated 70% withdrawn or settled before a hearing, leaving a possible 2,100 Register judgments to manually examine.
- 3 minutes viewing per judgment to establish whether it contains information covered by the request, and if so, to collate the data.
- $3 \times 2100 = 6,300$ minutes divided by 60 = 105 hours or 15 working days (based on 7 hours per day).

2005/2006

- 11,000 claims submitted – an estimated 70% withdrawn or settled before a hearing, leaving a possible 3,000 Register judgments to manually examine.
 - 3 minutes viewing per judgment to establish whether it contains information covered by the request, and if so, to collate the data.
 - $3 \times 3,000 = 9,000$ minutes divided by 60 = 150 hours or 21.5 working days (based on 7 hours per day).
31. The figures for submitted claims were produced by the Tribunals Service Statistics team. The Employment Tribunal annual statistics for the financial year 2005/06 confirm that 70% of claims were withdrawn, settled or disposed of before the Tribunal issued a final written judgment.
32. As to whether the process described by the public authority is relevant to the activities set out in the fees regulations, the Commissioner accepts that it described the location, retrieval and extraction of information. These activities do, therefore, conform to the tasks described in the fees regulations.
33. Turning to whether the estimate of three minutes per record is a reasonable estimate, the Commissioner did not ask the Ministry of Justice to provide a sample copy of a record from the Register, to check whether three minutes would be a reasonable length of time. This is because even if the Commissioner considered that each record should take an average of just one minute to search, the total time taken to complete the search would equate to approximately 85 hours of work, which is still well in excess of the appropriate limit. He is therefore satisfied that, the costs involved in locating, retrieving and extracting the information from the public Register would substantially exceed those specified in the fees regulations.

Other sources for the information

Casework Management System

34. The Ministry of Justice explained that all the requested information would at one time have been held in its casework management system.
35. The casework management system comprises an electronic database which sits alongside corresponding manual case files. These records would yield information about the cases Mr Sischy chaired which did not result in a judgment being issued. The system contains records for live and recently appealed claims. The records contain details of the

presiding Judge for each case as well as appellant details and the date of Judgment or other case outcome. The database is not searchable by these criteria, and thus the information requested by the complainant, were it held, could only be obtained by manually checking each record. The Ministry of Justice stated:

"The Tribunals Service does not record data of cases heard or the judgments issued by Presiding Judge. There is no business requirement to record this type of information."

36. The Ministry of Justice stated that it is "highly unlikely" that any information about cases that Mr Sischy was involved in are still held on the casework management system, due to its retention and destruction policy. Manual case files and electronic records are retained for twelve months after the case has been disposed of; or for two years (or until settled, if longer) if an appeal has been accepted by the Employment Appeal Tribunal. It supplied the Commissioner with a document titled *"Administrative Guide to Employment Tribunals Procedures: Retention and Disposal of Files"* which confirms this policy.
37. The complainant requested information spanning the period 2004-2006. Based upon the Ministry of Justice's disposal policy, the Commissioner accepts that, whilst on the balance of probabilities it is unlikely that case management records for cases heard by Mr Sischy are still held, the possibility nevertheless remains that case files from that period could still exist. The aforementioned retention policy sets out the following circumstances in which casework files might not be destroyed in line with standard procedures.
 - Where a judgment was appealed and the appeal has not yet been settled.
 - Where a judge instructs that a case file should be retained for longer than standard periods.
 - For lead cases which, while completed, are related to live cases.
 - For cases where there is an exchange of correspondence after the case has been disposed of (usually where the complainant is not content with the outcome).
 - Cases subject to a deposit order following a PHR, which must be retained for Audit trails.
38. The Commissioner therefore asked the Ministry of Justice how readily the casework system could be searched to locate cases chaired by Mr Sischy.

39. The Ministry of Justice states that the electronic case management system used by the Tribunals Service does not have the facility to conduct a search by the name of the presiding Employment judge. It has supplied a screen-print of the search screen which supports this claim. The only way to establish whether Mr Sischy was the presiding judge in any case still on the casework system would be to view each record and cross-reference it with the manual case file to which it relates.
40. The Ministry of Justice has explained there are 8,146 live cases still held on the electronic case management system for the period specified by the complainant: 1,759 for the period 2004/5 and 6,387 for the period 2005/6. (It did not provide details of how many closed cases were also retained, although it suggested that some would be.) Assuming each manual case file was readily accessible and that it was not overly voluminous, the Ministry of Justice estimated that it would take an average of two minutes per record to establish whether information covered by the request was held.

2004/5

1,759 cases at 2 minutes per case = 3,518 minutes divided by 60 = 58.6 hours or more than 8 working days (based on 7 hours a day).

2005/6

6,387 cases at 2 minutes per case = 12,774 minutes divided by 60 = 212 hours or more than 30 working days (based on 7 hours a day).

41. The Commissioner accepts that the activities involved in recovering any information held conform to the tasks described in the fees regulations. He therefore accepts that the costs involved in identifying whether the information is held in retained case files would substantially exceed those specified in the fees regulations.
42. As before, in considering whether the estimate of two minutes per record is a reasonable estimate, the Commissioner did not ask the Ministry of Justice to provide a sample copy of a record from the casework system and a manual file, to check whether two minutes would be a reasonable length of time. This is because even if the Commissioner considered that each record should take an average of just one minute to search, the total time taken to complete the search would equate to approximately 135 hours of work, which is still well in excess of the appropriate limit. He is therefore satisfied that the costs involved in identifying whether information covered by the request is contained in

the casework system would substantially exceed those specified in the fees regulations.

Human Resources records

43. The Commissioner asked whether HR records held by the Ministry of Justice might yield the information requested by the complainant.
44. The Ministry of Justice explained that no personal file was held regarding Mr Sischy's casework: his was a salaried position, whereby he was paid irrespective of the number of cases over which he presided. His personnel file holds only information relating to the date of his retirement.
45. In response to the question of whether any disciplinary records were held in respect of Mr Sischy, the Ministry of Justice stated:

"The Tribunals Service would not hold information in relation to a complaint about the conduct of a member of the judiciary; known as judicial complaint. A complaint about the conduct of an Employment Judge in Scotland would be dealt with by the President of the Employment Tribunals. Whilst the Tribunals Service might receive judicial complaints from time to time, we are only obliged to log the date of receipt and acknowledgement of any judicial complaints made via the administration. These complaints are not handled by Tribunal Service but passed on to a designated member of the Judiciary. Therefore, any records of this nature would not be held by the Tribunal Service as a public authority but by a judicial office holder who are not part of the Ministry of Justice.

...

Individual members of the judiciary are not public authorities for the purposes of the FOIA and are not listed in Schedule 1 of the Act. A judicial complaint in Scotland would be dealt with by the President of the Employment Tribunals. Therefore, any information in relation to the judicial conduct of Mr Sischy would not be held by any public authority within the scope of the FOIA.

...

The Office of Judicial Complaints (OJC) would hold any complaint file if it existed. I therefore in my investigation checked with them as well. They have confirmed that the OJC case database shows no record of any complaint against Mr Sischy."

46. Having considered all the information provided by the Ministry of Justice, the Commissioner has concluded that it conducted sufficient searches to be able to assert that the only possible locations from which any of the requested information might be obtained are the public Register and the casework management system.
47. He accepts that the Ministry of Justice has demonstrated that identifying whether any information is held and locating, retrieving and extracting any information would exceed the appropriate costs limit and that it is therefore not obliged to comply with the request by virtue of section 12(1). He notes however that the Ministry of Justice failed to state in its refusal notice and subsequent internal review that it could not confirm whether it held information in its case management system without exceeding the costs limit.

Section 16

48. Section 16 creates an obligation on public authorities to provide advice and assistance to enable an applicant to refine his request. The Commissioner considers this to be particularly important where requests are refused on the basis of costs.
49. The Commissioner finds that the Ministry of Justice offered the complainant advice inasmuch as it explained that merely refining the time frame for his request would not bring it within the costs limit, but that some of the information could be obtained by him viewing the public Register himself. It also directed him to the Employment Appeals Tribunal as an alternative source for some of the information. The Commissioner therefore considers that the Ministry of Justice discharged its obligation in respect of section 16.

The Decision

50. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - It correctly identified that to identify whether it held information covered by the request, locate, retrieve and extract it would exceed the appropriate limit at section 12(1) of the Act.
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - it failed, in breach of section 17(5), to state in its refusal notice that it could not confirm whether it held information about cases which did

not result in a judgment being issued in its case management system, without exceeding the appropriate limit.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

54. 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.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 5th day of May 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) 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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Exemption where cost of compliance exceeds appropriate limit

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.”

Section 12(2) provides that –

“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 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.”

Duty to provide Advice and Assistance

Section 16(1) provides that -

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

Section 16(2) provides that –

"Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

Refusal of Request

Section 17(5) provides that –

"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."