

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 February 2011

Public Authority: The Department for Work and Pensions
Address: 2nd Floor
The Adelphi
1-11 John Adam Street
London
WC2N 6HT

Summary

The complainant requested statistics about how many times it failed to send staff to Tribunal hearings annually for five calendar years and how many of those cases were lost by the public authority.

The public authority supplied some information and applied section 12(1) to the remainder and advised that it had contacted the Tribunal Service itself (who are part of the Ministry of Justice) who did not collate this information either. The complainant asked the Commissioner to determine whether reasonable advice and assistance was provided to him in this case in line with section 16(1) of the Act.

The Commissioner has found that section 16(1) was breached by the public authority. However, he does not require any remedial steps to be taken for the reasons outlined in the Notice.

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. It is important to note that this case discusses the interrelationship between two different public authorities:
 - The Department for Work and Pensions (which is responsible for welfare generally); and
 - The Ministry of Justice (who are responsible for the Tribunal Service, which is an Executive Agency of it).
3. The Commissioner is only considering how the Department of Work and Pensions has handled the request for information it received from the complainant. It will be known as the public authority for the remainder of this Notice.
4. It is also useful to know that the role of a Presenting Officer is to act as a friend of the Court ('amicus curiae'). They must be aware of the case and ensure that the Tribunal is aware of all the relevant facts, rather than just the public authority's position.

The Request

5. On 27 April 2010 the complainant requested the following information to be provided in accordance with the Act:
 - '1. Can the Department for Work and Pensions please state on how many occasions it declined to send a presenting officer and/or similar representative to tribunal hearings organised and/or run and/or managed by the UK Tribunal Service? These hearings will of course relate to previous decisions made by the DWP. Can the DWP please provide the figures for non-attendance by staff for 2010.*
 - 2. Can the DWP please provide the above figures for each of the following years 2006, 2007, 2008, 2009.*
 - 3. How many of the cases which the DWP did not attend resulted in a victory for the appellant. Can you please provide any figures you have for 2010 as well as figures for 2006, 2007, 2008, 2009.'*
6. On 24 May 2010 the public authority issued its response. It explained:

- (i) That it held a small subset of information for its Compensation Recovery Unit in relation to request 1 (the number of cases that were not attended). It provided this information;
 - (ii) That it had checked its electronic and paper records in its main business areas – Job Centre Plus and Pension Disability and Carers Service and they did not hold a central record of the information requested. It explained that it believed it had no business reason to do so;
 - (iii) The only way that the information could be generated was by it checking every manual record that it holds and this would exceed the costs limit of £600. It was therefore applying section 12(1); and
 - (iv) It had contacted the Tribunal Service who had 'confirmed that they do not collate this information'.
7. On 11 June 2010 the complainant requested an internal review. He explained that he did not expect that the information could not be provided within the time and financial constraints of the Act. He also explained that he disputed that the Tribunal Service did not hold the information because it had published figures previously and that the advice provided was not therefore correct.
8. On 29 June 2010 the public authority communicated the results of its internal review. It upheld its position. It explained that the only way it holds the information requested is in the individual files and that it would need to check whether each case has been appealed and then sift through them to extract the information. It therefore applied section 12(1) appropriately. For element 3, it explained that it believed that the information owner was the Ministry of Justice. It explained that it had contacted it and that it had told the public authority that it did not collate the information requested. However, it provided the Ministry of Justice's details to enable the complainant to challenge this further.

The Investigation

Scope of the case

9. On 4 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

The complainant specifically asked the Commissioner to consider the following points:

1. That at this stage he believed that the public authority did hold a central record containing the requested information; and
 2. That he believed that the advice and assistance provided was wrong because the Tribunal Service did hold the information that was sought.
10. On 13 August 2010 the complainant agreed that the Commissioner should focus his investigation purely on section 16(1) and that he was withdrawing his complaint about the operation of section 12(1).

Chronology

11. On 13 July 2010 the Commissioner wrote to the complainant and the public authority to confirm that he had received an eligible complaint.
12. On 14 July 2010 the public authority wrote to the Commissioner to clarify the nature of the complaint and the Commissioner responded on the same day.
13. On 27 July 2010 the Commissioner wrote to the complainant. He explained the scope of his investigation and asked the complainant whether he had approached the Tribunal Service or not. He also asked for the complainant to provide further evidence that information was already in the public domain.
14. On 4 August 2010 the complainant telephoned the Commissioner. He explained that he had approached the Tribunal Service and the results place some doubt on the response that was received from the public authority. He forwarded the response on the same day. He did not provide further evidence that other information was in the public domain.
15. On 13 August 2010 the Commissioner telephoned the complainant to acknowledge the receipt of that response. The complainant agreed that he would be content for this investigation to focus solely on section 16(1). The Commissioner then asked detailed enquiries of the public authority and received answers on 1 September 2010.

Analysis

How does the public authority hold relevant recorded information?

16. In order to make an informed assessment of the advice and assistance that has been provided in this case, the Commissioner has decided that it is necessary to understand how the relevant recorded information was held in this case at the date of the request.
17. The complainant's requests require the public authority to know two things:
 1. Whether or not there was a representative from the public authority at a hearing (such as a presenting officer); and
 2. The outcomes of cases.
18. The public authority does not hold a central record of both things together. It also cannot generate this information through its electronic casework system.
19. The public authority would be able to obtain this information through looking through all its manual casework files. It explained that it dealt with a lot of claims as on an average day it processed:
 - 16,000 new benefit claims.
 - 3,000 applications for state pension; and
 - 3,000 renewal applications for Disability.
20. While only a small fraction of applications processed are appealed, due to scope of business this still was a large number. It provided the Commissioner with the numbers for 2009/10:
 - 237, 475 cases in respect to the Job Centre Plus; and
 - 80, 317 cases in respect to the Pensions, Disability and Carers Service.
21. Therefore assuming one can identify the appeal files from the other files it would be necessary to check through around 300,000 files for each annual period to obtain the information to answer the request.
22. In addition, the public authority's central Decision Making and Appeals policy team does receive monthly appeal statistics from the Tribunals Service. These figures do not contain only information about the Department of Work and Pensions because they relate to a wider

category 'social support and child support cases'. This covers the public authority, local authority decisions (who administer Housing and Council Tax Benefit), Her Majesty's Revenue and Customs (for Tax Credits, Child Benefit and guardians allowance) and the Child Maintenance and Enforcement Commission.

23. These figures do contain the number of appeals and whether presenting officers attended the appeal. However, they cannot separate out the public authority's figures from the wider category.

24. The Tribunal Service also holds some information that was relevant to the request. The complainant asked for similar information from it and received:

(1) The information on its GAPS2 database that answers question one and part of question two (as it only goes back to April 2007); and

(2) The information on its GAPS2 database that answers part of question three (as it only goes back to April 2007).

25. Furthermore, the public authority pointed out that the day after it communicated its internal review [30 June 2010] the Tribunal Service disclosed its quarterly statistics at the following link:

<http://www.tribunals.gov.uk/Tribunals/Documents/Publications/QuarterlyBulletin0910.pdf>

And it also published its Annual report found here:

<http://www.tribunals.gov.uk/tribunals/Documents/Publications/tribs-annual-stats-2009-10c.pdf>

26. This data included statistics on receipts, cases closed and the outcome of those cases but does not appear to contain information about the presenting officers. The public authority explained that it believed that it should have directed the complainant to this wider information when it became aware of its existence. It did not know that the Tribunal Service produced this information at the time of the request.

27. The Commissioner has checked the earlier Annual reports and notes that the information is less specific, although there is information about receipts and disposals; but not identifiable information about presenting officers.

Section 16(1)

28. The complainant has argued that the advice and assistance that he was provided was inadequate in this case and also turned out to be misleading. His focus was on the advice that the public authority provided about the Tribunal Service's position. He had made a separate request to the Tribunal Service and received the information stated in paragraph 24 above.
29. The complainant therefore submitted that while the response in relation to the Tribunal Service, which stated that it 'does not collate' the information requested (without receiving a request for it) was factually correct, it was misleading to imply that it would be unable to do so – as his connected request proved that it could do so from April 2007.
30. The public authority has accepted that the advice and assistance it has provided has proved to be insufficient in this case. It explained that with the benefit of hindsight it should have transferred the request to the Tribunal Service, instead of contacting it and trying to procure the information from it as part of its response. It also explained that it could have provided further advice and assistance and this matter will be discussed in more detail in the analysis section below.
31. Section 16(1) (full copy in the legal annex) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
32. The Commissioner's view is that section 16(2) relates only to the paragraphs in Part ii of the Code of Practice entitled '*The provision of advice and assistance to persons making requests for information*'. This follows paragraph 3 that clarifies that it is only this part of the Code of Practice to discharge their duty under section 16(1) of the Act. Therefore, if paragraphs 4 to 15 are satisfied, reasonable advice and assistance must be deemed to have been provided and the obligations under section 16(1) are met.
33. In order to consider section 16(1) fully, the Commissioner will work his way through the appropriate parts of the section 45 Code of Practice and consider whether its provisions were complied with in this case.

34. Paragraphs 4 and 5 concern procedures for dealing with requests. It explains that the public authority should consider whether it needs to create written procedures about those occasions when it doesn't hold information (and about potential transference of requests). The public authority does provide detailed guidance on its website on how to make requests for information¹. However, it has chosen not to have publicly available policies about when to transfer requests on its website. It also provides a link to the Ministry of Justice website, which includes the appropriate Code of Practice. The Commissioner believes that paragraphs 4 and 5 do not present mandatory requirements to have policies in these circumstances and the public authority's website is clear and helpful. It follows that the public authority has complied with its obligations under paragraphs 4 and 5.
35. Paragraphs 6 and 7 explain the assistance that should be given when advising an applicant how to frame their request. In this case the complainant has considerable experience in framing requests and there was no difficulty in understanding what he was after. It follows that no further advice or assistance was required to comply with its obligations under paragraphs 6 or 7.
36. Paragraphs 8 to 12 explain the assistance that should be provided to a complainant when further clarification needs to be sought by the public authority to enable it to identify and locate the information sought. It provides a non-exhaustive list of the sorts of assistance that can be provided. It explains that a flexible approach should be expected. In this case, it was clear what was being requested and therefore no further assistance was required to comply with its obligations under paragraphs 8 to 12.
37. Paragraphs 13 to 15 of the Code explain what assistance may be required when one relies on the fees limit. In summary whenever the cost limit has been applied, the Commissioner must consider whether it would be possible for the public authority to provide advice and assistance to enable the complainant to submit a new information request without attracting the costs limit.
38. The public authority explained that it was correct that it could not provide any further advice and assistance in respect to this matter. The reason for this was the magnitude of the costs that would be stacked up through it checking each of its files to extract the necessary information. It explained that the Commissioner should consider the magnitude of the files as outlined in paragraphs 19 and 20 of this Notice. It is apparent from the numbers that it would not be feasible to

¹ <http://www.dwp.gov.uk/freedom-of-information/#how-do-i>

invite the complainant to narrow his request down to just a year, or a quarter or even a month. It therefore was reasonable to not advise the complainant to narrow down his request.

39. The Commissioner has considered the situation. He notes that there are around 25,000 appeals every month over this five year period. The costs limit is 24 hours work. Therefore for the costs limit not to be engaged for one month of data it would be necessary to be able to check 18 files a minute for 24 hours. The Commissioner does not believe that this work would be possible to undertake in these timescales and concludes that it was reasonable not to offer any advice and assistance in this case about how to narrow the request to bring it within the costs limits.
40. The statistics for one month (or much less) would not serve the purpose for which the complainant wants them. It would not be reasonable therefore to narrow the request down to allow the complainant to receive a full set of information for a smaller period of time.
41. However, it would have been possible to offer the complainant a different way of narrowing his request down. In this case, the Commissioner believes that the public authority should have offered the statistics it held that are mentioned in paragraphs 22 and 23 of this Notice. Its failure to offer this advice and assistance was a breach of section 16(1) and it contravened paragraph 14 of the Code of Practice.
42. The Commissioner does not believe that it is appropriate to order any remedial steps in respect to this breach because the complainant has confirmed that he has now received appropriate information from the Tribunal Service.
43. The Commissioner has also noted that the public authority has experienced additional difficulties around the transferring of the request. This relates to part iii of the Code of Practice. While this part of the Code of Practice is not embraced by section 16(2), the Commissioner feels it is appropriate to make further comments about it in the 'Other Matters' section of this Notice.

The Decision

44. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:

- This was because it breached section 16(1) because it failed to provide reasonable advice and assistance.

Steps Required

45. The Commissioner requires no steps to be taken for the reasons outlined in paragraphs 42 above.

Other matters

46. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following further matter of concern:

Compliance with Part iii of the section 45 Code of Practice

47. As noted above, part iii of the Code of Practice outlines desirable practice when the public authority is aware that it does not hold what has been requested, but is aware that another public authority may do.
48. Paragraphs 16 to 24 of the Code outline the public authority's obligation to transfer requests where this would be reasonable advice and assistance.
49. Paragraph 17 explains that where the public authority has reason to believe that some or all of the information that it does not hold is held by another public authority then it should consider whether to transfer the request. Paragraph 23 explains that it should do this as soon as practicable and inform the applicant as soon as possible.
50. Paragraph 18 explains that it can do this by explaining that it may be held by another authority and providing its details. Paragraph 19 explains that in some circumstances it should transfer the request directly. It explains that it should consult the other public authority first and ensure that it will confirm that it holds the information.
51. Paragraph 20 explains that the public authority must decide:
1. Whether transfer is appropriate; and
 2. Whether the applicant has any grounds to object (as if so, then it shouldn't do so automatically and should get consent).

52. In this case, the public authority contacted the Tribunal Service and provided the Commissioner with an email showing it doing so. This prompted a phone call from the Tribunal Service that explained that it did not collate the information requested. The Commissioner believes that the public authority has tried to be helpful in this case, but unfortunately it failed to establish on the telephone whether the Tribunal Service held relevant information and this led to it being under the wrong impression that it did not.
53. The position it took in its internal review was to imply that it denied that the Tribunal Service held relevant recorded information and provided its details for the complainant to address that public authority if he disagreed.
54. In the Commissioner's view, this advice and assistance failed to accord with the Code of Practice. This was because it did not advise that information was held by another public authority and provide its details (so comply with paragraph 18) or transfer the request when it was reasonable to do so (so comply with paragraph 20).
55. The public authority has acknowledged that it should have transferred the request and acknowledges with the benefit of hindsight that it should have done so.
56. However, the Commissioner has noted that all the evidence that he has seen show the public authority to be trying its best and that the unusual circumstances of this case have led to this contravention of the Code of Practice.

Right of Appeal

57. 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

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 sent.

Dated the 16th day of February 2011

Signed

**Andrew White
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

(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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

...

Section 12 – Exemption where cost for compliance exceeds the appropriate limit

(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.

(3) 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.

(4) 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.

(5) 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 to be estimated.

Section 16 – Duty to provide advice and assistance

(1) 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.

(2) Any public authority which, in relation to the provision of advice or 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.