

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2015

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

Decision (including any steps ordered)

1. The complainant requested details about numbers of cases with legal representation heard by a specified tribunal over a specified time period. The Ministry of Justice (the 'MOJ') refused to provide the requested information on the basis that to ascertain whether or not the information is held would in itself exceed the appropriate cost limit in section 12(2) of FOIA. During the course of the investigation, however, the MOJ confirmed that details of the type of legal representation at appeal hearings is recorded on an 'attendance form' which is held on either the paper or electronic appeal hearing case file.
2. As it is clear that the requested information is held, the Commissioner's decision is that the MOJ incorrectly cited section 12(2). He therefore requires the public authority to take the step detailed in paragraph 3. The MOJ also breached section 10 of FOIA by failing to respond to the request within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - issue a fresh response to the request set out in paragraph 5 of this notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 January 2015 the complainant wrote to the MOJ and requested information in the following terms:

"Could you please let me know the yearly number and proportion of cases heard by the Special Educational Needs and Disability first tier Tribunal over the last three years in which a Local Authority was represented by a solicitor or barrister."

6. The MOJ responded late on 11 February 2015. It refused to provide the requested information on the basis that to confirm whether it held the requested information would exceed the cost limit, and cited section 12(2) of FOIA. In accordance with section 16 of FOIA the MOJ provided advice and assistance to the complainant as to how he might refine his request to potentially bring it within the cost limit.
7. The complainant requested an internal review on 13 February 2015. The MOJ responded late on 2 April 2015. It maintained that section 12(2) applied. Again, the MOJ provided advice and assistance.

Scope of the case

8. The complainant contacted the Commissioner on 16 April 2015 to complain about the way his request for information had been handled. He raised concerns that the MOJ had made its decision without taking any steps to investigate whether the requested information existed in electronic form in the records of a tribunal which it itself administered. He also highlighted that if the cost of providing this information exceeds the statutory limit, he would be prepared to modify his request to two years, 2012 and 2014.
9. The Commissioner notes that the appeals information is held electronically from April 2014 onwards, but acknowledges that the hard copy version of the file may need to be referred to in order to determine whether a local authority was legally represented and in what form. He notes that the complainant is prepared to narrow his request to two rather than three years. However, he also acknowledges that the MOJ has already advised the complainant that to confirm whether the information is held for one year alone would exceed the cost limit.
10. The Commissioner has considered whether the MOJ correctly relied on section 12(2) of the FOIA.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate limit

11. By virtue of section 1(1)(a) of FOIA the MOJ is obliged to confirm or deny whether it holds information described in a request unless it is exempt from its obligation to do so.
12. By virtue of section 1(1)(b), the MOJ is obliged to provide this information, if held, unless it is exempt from its obligation to do so.
13. The MOJ's position is that it is not obliged to comply with the request by virtue of section 12(2) of FOIA. In practical terms, this means the MOJ is arguing that it is not obliged to provide confirmation or denial as to whether it holds the requested information by virtue of section 12.
14. Section 12(1) 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.
14. Section 12(2) states that section 12(1) does not exempt the public authority from its obligation to comply with section (1)(1)(a) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. This is the MOJ's position.
15. 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' (or 3.5 days' work) for a central government public authority such as the MOJ.
16. When estimating whether confirming or denying whether it holds the requested information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in determining whether it holds the information. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.

Would the cost of compliance exceed the appropriate limit?

17. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - determining whether it holds the information;

- 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.
18. The Commissioner would stress here the effect of section 12(2) which states that section 12(1) "*does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) [providing confirmation or denial that requested information is held] unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit*".
 19. The Commissioner has therefore considered whether the MOJ is obliged to comply, at least, with section 1(1)(a) of FOIA or whether it would exceed the cost of compliance to do even that.
 20. The MOJ acknowledged that the request had asked for the last three years of data. It explained that, because the reporting year in the Special Educational Needs and Disability Tribunal annual report is in school years, running September to August, the MOJ had interpreted the request as school reporting years, therefore 2011/12, 2012/13 and 2013/14.
 21. It said that the reason section 12(2) applies to the requested information is because a "manual trawl" through the files is necessary as the information is not held in an easily accessible form, or collated in the usual course of business, or held electronically.
 22. The MOJ explained that once an appeal has been heard, the decision is copied and sent to all parties, and that decision is then placed within the paper file. Once the file becomes dormant it is sent to an offsite archive where it is retained for three years from the date the decision was issued.
 23. In addition, the MOJ said that the Special Educational Needs and Disability Tribunal moved to a new generic appeals handling database in 2011 and since then this data has not been collected, nor is it a requirement that it should be collected. The MOJ confirmed that all data

prior to 2011 has already been published and is available at the following website¹.

24. During the investigation, the MOJ clarified that all the appeal decisions for 2011/12 and 2012/13 are held on paper in archives. It said that from April 2014 decisions started to be saved electronically, but noted that if parties had not supplied an email address the decision would have been sent out by post and not saved in this way.
25. As is the practice in a case such as this, the Commissioner asked the MOJ for a detailed estimate of the time taken/costs incurred in respect of complying with the request for information.
26. To determine if all the information requested is held, the MOJ would be required to run a report to determine the appeals heard and to retrieve each of the paper-based files held at an offsite archive centre. The MOJ said that to locate and read through the decisions on each of the retrieved files, and to record the findings onto a spreadsheet, would take seven minutes per file on average.
27. The MOJ confirmed the numbers of appeals heard by the relevant tribunal as follows:

2013 to 2014	797
2012 to 2013	808
2011 to 2012	821
28. This gives a total of 2,426 appeals which have been decided during the relevant timeframe. At seven minutes per appeal file this would equate to £7,075, which is well above the £600 cost limit.
29. The MOJ explained to the Commissioner that, dependant on the type of case, the local authority concerned will either represent itself or instruct a solicitor or barrister.
30. The MOJ confirmed that a sampling exercise was carried out to look at a file held in the office at the time of the request. It said the same exercise had been carried out with one of the decisions held electronically and it was found that the information could not be gathered without further reference to the hard copy of the file which

¹<http://webarchive.nationalarchives.gov.uk/20130128112038/http://justice.gov.uk/publications/corporate-reports/tribunals/send>

therefore increased the review time. The MOJ recognises, however, that this would not necessarily be the case for all the decisions held electronically.

31. It explained that, due to the cost of recalling files from storage, it had not undertaken a more detailed sampling exercise. It confirmed that the small sampling exercise carried out had not identified a case where the local authority had been represented by a solicitor or barrister. For this reason, the MOJ said although it is likely that the requested information is held, it had not been able to determine this through the sampling exercise. However, it said that had it been able to determine whether the information is held, section 12(1) would be engaged due to the number of files falling in scope of the request and the time it would take to locate, retrieve and extract the information.
32. The key question for the Commissioner, therefore, is whether the average figure of seven minutes per file is reasonable. The complainant was given the following explanation by the MOJ on 16 February 2015:

"I understand reading the decision is the quickest part of the process. I would like to explain further where the 7 minutes comes from. As each of the files are offsite and located on a site which contains approx 500k appeal files from different jurisdictions. When a file is sent to offsite storage these are located in a box with other files that have been disposed of such as conceded or withdrawn appeals, and often 10-12 files are stored in each of these boxes. Therefore, to recall these files back we would need to identify which box the file would be in and go and locate the box, open the seals of the box, locate the file within the box, reseal the box, and place the file into the return box to the office in Darlington (taking approximately 3 minutes each). This process would have to be repeated to place back into archives with the additional time of logging them all from Darlington taking approximately similar time, and then allowing reading the decision and recording.

Unfortunately I hadn't included the courier charge we would incur in recalling these files back to the office, usually we send 1,000 files at a time costing us approximately £100, therefore retrieving and returning the files would cost £400."

33. The Commissioner considers this estimate is a reasonable figure.
34. However, the MOJ has provided the Commissioner with key information about the information which is recorded. It has confirmed that Tribunal decisions do confirm whether a local authority has been represented, and, whilst it is not always clear whether this was by a solicitor or

barrister, in those cases where it is not evident then the manual case file could be reviewed to locate and check the relevant 'attendance form' which would record this detail. The MOJ has therefore confirmed that the requested information is held either in the tribunal decision itself, or if not, on the 'attendance form' held in the appeal hearing case file.

Section 12(2) – conclusion

35. The MOJ has argued that to determine whether or not it holds the requested information would exceed the appropriate limit and it has therefore relied on section 12(2) of the FOIA. However, it is apparent to the Commissioner that this position is flawed. He has reached this conclusion for the following reasons.
36. The MOJ has confirmed that whether or not a solicitor or barrister was used by a local authority will be recorded on an 'attendance sheet' for each hearing. This is apparent for all cases heard at the Tribunal. In addition, for some more recent cases this information may also be recorded on an electronic database which has been in use since 2014 - although the Commissioner accepts the MOJ's position that this may not necessarily be the case and that the only way to accurately gather the information would be to consider each manual file and inspect the 'attendance sheet'.
37. Whilst the Commissioner does not doubt that this would be a very onerous task because of the volume of cases identified by the MOJ, he does not agree with its position that section 12(2) applies. This is because the MOJ is aware that the information itself is indeed recorded.
38. The Commissioner therefore concludes that section 12(2) does not apply.

Section 10 – Time for compliance

39. Section 10(1) of FOIA provides that 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.
40. From the information provided to the Commissioner it is evident that the MOJ did not respond to the complainant within the statutory timeframe in respect of this request.
41. The Commissioner finds that the MOJ breached section 10(1) of FOIA in this case and has ensured that the details of the case have been recorded for future monitoring purposes.

Other matters

42. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 35 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

43. 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

44. 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.
45. 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

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