

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2016

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

Decision (including any steps ordered)

1. The complainant submitted a multi-part request to the Ministry of Justice (MoJ) requesting information relating to a job re-grading exercise.
2. Having initially cited other exemptions, the MoJ revisited the request during the course of the Commissioner's investigation and cited section 12 of the FOIA (cost of compliance exceeds the appropriate limit).
3. The Commissioner's decision is that the MoJ correctly applied section 12. However, in failing to provide a response within 20 working days of the request, the MoJ breached section 10 of the FOIA.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. The request in this case is similar to a request for information from another individual which the Commissioner has previously considered. The decision notice in that case (FS50576113) was issued on 18 January 2016¹.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1560527/fs50576113.pdf>

6. Both the request in that case and the request in this case relate to a re-grading process that took place prior to the Legal Aid Agency (the LAA) changing from a non-departmental government body – then known as the Legal Services Commission - to an executive agency of the MoJ in April 2013.
7. As an executive agency of the MoJ, the LAA falls within its remit for the purposes of the FOIA. The MoJ is therefore the appropriate public authority in this case.

Request and response

8. On 30 October 2014, the complainant wrote to the MoJ requesting disclosure under the Data Protection Act 1998 (DPA) of the following information:
 - *"[name redacted]'s report dated 1 July 2014 (or earlier) – which was said by [name redacted] on 1 July 2014 to be with [name redacted] for consideration – which reported on the scoring panel (of 20 June 2014) findings and set out [name redacted]'s recommendations*
 - *A copy of the minutes/notes from the moderation panel in July 2014*
 - *A copy of the final report following the July 2014 moderation panel*
 - *A copy of the legal landscape paper ... which amongst other things considered the issue of specialist pay*
 - *Copies of all the documentation/correspondence relating to how the decision communicated on 24 January 2013 that my role qualified for specialist pay was reached*
 - *Copies of the documentation/correspondence relating to how the decision communicated on 6 October 2014 that my role no longer qualified for specialist pay was reached*
 - *Copies of any documentation/correspondence between Shaun McNally and Head of Profession Ruth Wayte, or others regarding specialist pay between June 2014 and October 2014".*
 9. The MoJ responded on 9 March 2015. It confirmed that it had considered the request as a request for personal information under the provisions of the DPA. It also advised that it had considered parts of the request under the FOIA.
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10. With respect to the request being a subject access request, the MoJ confirmed that it does not hold any personal information within the scope of the request. With respect to those parts of the request which it handled under the FOIA, the MoJ confirmed that it holds relevant information but refused to provide it, citing section 40(2) FOIA (personal information) as its basis for doing so.
11. The complainant requested an internal review on 16 March 2015. The MoJ sent her the outcome of its internal review on 15 April 2015 upholding its original position.

Scope of the case

12. The complainant provided the Commissioner with the relevant documentation on 27 April 2015 to complain about the way her request for information had been handled.
13. The Commissioner's investigation into the MoJ's handling of this request for information has been lengthy and protracted. The Commissioner provides further comment on that in "Other matters" below.
14. During the course of the Commissioner's investigation, the MoJ revisited the original request and corresponded both with the Commissioner and the complainant.
15. The Commissioner acknowledges that, in its correspondence with the complainant, the MoJ referred to a response it had provided in relation to another request seeking very similar information on the topic of specialist pay for lawyers within the MoJ/LAA. In that respect, the complainant acknowledges receiving correspondence from the MoJ, for example on 16 September 2015.
16. The Commissioner also acknowledges that, in an attempt at informal resolution, the MoJ provided the complainant with some information on a discretionary basis, outside of the FOIA.
17. Following further correspondence, the complainant wrote to the Commissioner on 24 July 2016 confirming that she wished to pursue her complaint. She stated that she remained concerned that her *"straight forward request for information"* had been delayed and denied.
18. During the course of her investigation, the Commissioner issued the MoJ with an Information Notice in accordance with her powers under section 51 of the FOIA. By way of that Notice, the Commissioner required the MoJ to furnish her with further information about its handling of the request for information in this case.

19. In response to that Information Notice, the MoJ provided the Commissioner with a substantive response in which it said that it considers that section 12 of the FOIA applies to the whole of the request for information.
20. A public authority is able to claim any exemption (including section 12) for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
21. Accordingly, the analysis below considers the MoJ's application of section 12 of the FOIA to the requested information.

Reasons for decision

Section 12 cost of compliance

22. Section 12(1) of the FOIA states 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".

23. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case.

24. Section 12(4) of the FOIA states 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".

25. In other words, when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied.

26. Regulation 5(2) of the Fees Regulations requires that the requests which are to be aggregated relate "to any extent" to the same or similar information.
27. The Commissioner's guidance on requests where the cost of compliance exceeds the appropriate limit² acknowledges that public authorities can aggregate two or more separate requests. It also recognises that multiple requests within a single item of correspondence are separate requests for the purpose of section 12.
28. In this case, the MoJ confirmed that it characterised the complainant's request as containing more than one request within a single item of correspondence.
29. It told the Commissioner:

"Having considered the wording of the seven parts of the request, the MoJ concluded that they can be aggregated for the purpose of calculating the cost of compliance, in accordance with section 12(4) of the FOIA and regulation 5 of the Fees Regulations. This is because they follow an overarching theme and common thread centred around the issue of 'specialist pay'".

30. Having considered the matter, the Commissioner is satisfied that the individual components of the multi-part request in this case comprise separate requests for the purpose of section 12 and that the requests relate to the same or similar information.
31. She is therefore satisfied that the MoJ was entitled to aggregate the requests when considering whether complying with them would exceed the appropriate limit.

Would complying with the request exceed the appropriate limit?

32. 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:

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

- 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.
33. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
34. In its submission in support of its application of section 12, the MoJ explained to the Commissioner:

"The MoJ has had particular regard to question 5, 6 and 7 of the complainant's request. These parts of the request do not ask for specific documents. Instead, the complainant has provided a description of the type of information she would like to be provided with".

35. The MoJ told the Commissioner that there is no single central location where the information described at parts 5, 6 and 7 of the request would be held. It provided her with details of the individuals it considered may hold relevant information given the subject matter of the request, together with the nature of the searches that would be required to locate it.
36. In its submission, the MoJ made reference to case reference FS50576113 and its submissions in connection with that complaint.
37. In that respect, the MoJ said:

"Having considered the instant complaint, MoJ has noted the similarities between [the earlier] FOIA request (MoJ ref [redacted]) at questions 9, 10, 11 and 12 and the request from [the complainant] at parts 5, 6 and 7. In particular, MoJ has noted that [the earlier] request at parts 10, 11 and 12 is narrower in scope than that of [the complainant] as it is restricted to a specific timeframe, and identifies which members of staff the MoJ should confine its searches to".

38. The MoJ acknowledged that the searches which would need to be undertaken to comply with the request in this case may differ slightly to those required in the earlier case. Notwithstanding that, it told the Commissioner:

"However, having noted the non-specific nature of the queries at parts 5, 6 and 7 of [the complainant]'s request (in that they do not

specify a particular time frame, and are not limited to particular members of staff), and that the FOIA cost limit would be exceeded by searches of information held by only the Director of Case Management and the Head of the High Cost Civil Team for a request so similar in nature, it is inevitable that the time taken to answer [the complainant]'s request would still significantly exceed that stipulated by the FOIA".

39. The Commissioner's decision in case reference FS50576113 was that the MoJ correctly applied section 12. Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between this case and FS50576113 is such that she is able to reach the same decision about disclosure without the need for further analysis.
40. From the evidence she has seen during the course of her investigation, and taking into account the aggregation of the multiple parts of the request, the Commissioner is satisfied that the MoJ has demonstrated that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and the MoJ is not required to comply with the request.

Section 16 advice and guidance

41. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit.
42. In this case, the Commissioner is satisfied that, during the course of her investigation, the MoJ wrote to the complainant in relation to its citing of section 12 of the FOIA. It explained that although it could not comply with the request above, it may be able to answer a refined request within the cost limit. The MoJ advised the complainant that she may wish to refine her request, for example by narrowing the scope of her request to specific documents.

Section 1 general right of access

Section 10 time for compliance

43. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and "*not later than the twentieth working day following the date of receipt*".

44. In this case the MoJ breached sections 1(1) and 10(1) by failing to respond substantively to the request within 20 working days.

Other matters

45. The Commissioner's investigation into the MoJ's handling of this request for information was beset by lengthy delays as a result of the MoJ's poor engagement with the ICO.
46. The Commissioner expects the MoJ to ensure in future that engagement is sufficient to enable her to carry out her investigations promptly.

Right of appeal

47. 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

48. 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.
49. 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

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