

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2016

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

Decision (including any steps ordered)

1. The complainant requested information concerning the handling of correspondence by the MoJ. The MoJ responded, after a delay, to some of the points in the complainant's correspondence and refused them on cost grounds under section 12(1) of the FOIA. It did not respond to the remaining points in the complainant's correspondence.
2. The Commissioner's decision is that the MoJ cited section 12(1) correctly and so was not obliged to comply with those parts of the complainant's request. However, she also finds that the MoJ breached section 17(5) of the FOIA in failing to respond within 20 working days with the section 12(1) refusal notice, and sections 1 and 10 in not responding to some other parts of the complainant's correspondence that the Commissioner believes were valid requests for recorded information.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation.
 - Respond to parts 4.5 to 4.7 of the complainant's correspondence in accordance with the requirements of the FOIA.
4. The MoJ 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 3 November 2015 the complainant wrote to the MoJ via his MP and requested information in the following terms:

" 4.1 [A statement] the Ministry had at the material time, and still has, no arrangements for handling inwards mail in the way I have indicated

4.2 the approximate number of letters that were addressed to that Secretary of State and that were received through the general post at that address in the three months ended 30 September 2015 (or, if such information is not available for that period, for another period of no lesser length, that ended later)

4.3 the number of instances that there have been of the ministry receiving complaints from correspondents that, after five weeks have elapsed since the correspondent sent a letter so addressed through the general post in the period to which the response to paragraph 4.2 above relates, no reply was received

4.4 the number of instances that there have been of a reply to such a letter having been sent through the general post, but the addressee contending that it was not received after two weeks of it being so posted

4.5 the steps in place to monitor the handling of the Ministry's inwards mail, to ensure that all letters are properly dealt with, that all replies are properly dispatched through the general post and that all complaints per paragraphs 4.3 and 4.4 above are investigated independently of the staff involved with such handling

4.6 if the ratio of complaints per paragraph 4.3 above to letters per paragraph 4.2 above is more than 1:20,000, details of the steps taken by the Ministry with the Royal Mail to ascertain if such letters were 'lost' in the post, and with what outcome

4.7 if the ratio of instances per paragraph 4.4 above of letters so 'lost' to letters so sent is more than 1:20,000, of what steps have been taken by the Ministry with the Royal Mail to ascertain if letters so sent were 'lost', and with what outcome".

6. After a delay the MoJ responded on 13 January 2016. It addressed only parts 4.2 to 4.4 of the above and refused them on cost grounds under section 12(1) of the FOIA.

7. The complainant responded on 28 January 2016 and requested an internal review. The MoJ failed to carry out a review.

Scope of the case

8. The complainant contacted the Commissioner initially by correspondence received on 14 April 2016, at that stage to complain about the failure by the MoJ to carry out the internal review promptly. The Commissioner contacted the MoJ on 24 May 2016 and asked it to complete the internal review.
9. Having received no substantive response from the MoJ, the Commissioner contacted the complainant on 9 June 2016 and asked if he wished this case to proceed to a consideration of the citing of section 12(1). The complainant responded and confirmed that he did.
10. The following analysis covers the citing of section 12(1) for parts 4.2 to 4.4 of the request above and the lack of response from the MoJ to some of the questions covered above. The breach of the FOIA through the late response to the request is also recorded and the failure by the MoJ to carry out an internal review is covered in the "Other matters" section below.

Reasons for decision

Section 17

11. Section 17(5) provides that where a public authority is relying on section 12(1), it must issue a refusal notice to the requester stating that within 20 working days of receipt of the request.
12. During this investigation the MoJ supplied the ICO with a copy of a refusal notice that bore the date "*December 2015*". The Commissioner, however, was already aware from the papers supplied by the complainant that the refusal notice sent to the complainant had actually been dated 13 January 2016. In failing to respond to the request within 20 working days of receipt the MoJ breached section 17(5) of the FOIA.

Sections 1 and 10

13. For a request to be valid for the purposes of the FOIA, it must meet the criteria set in section 8(1), which are that it is in writing, states the name and address of the requester and describes the recorded information that is requested. A failure to respond to a request that meets the criteria set out in section 8(1) constitutes a breach of sections 1 and 10 of the FOIA.
14. The MoJ did not respond to points 4.1 or 4.5 to 4.7 of the complainant's letter and confirmed to the Commissioner that this was because it did not regard those parts of the letter to constitute requests for recorded information. The Commissioner has considered whether any of those numbered parts of the complainant's letter did constitute requests for recorded information and hence whether the MoJ should have responded to them in accordance with the provisions of the FOIA. Her conclusions are as follows.
15. Part 4.1 would require the MoJ to create information, rather than disclose recorded information which it already holds. Creating information is not a requirement of the FOIA and this part of the complainant's letter was not a valid request for recorded information for the purposes of the FOIA.
16. In relation to parts 4.5 to 4.7 of the FOIA the view of the Commissioner is that the complainant did describe recorded information that he was seeking. The likelihood of whether the MoJ would hold the information described in those sections is not the issue. Where a public authority receives a request for information that it does not hold, it is obliged to respond to the requester stating that.
17. The Commissioner finds that the MoJ breached sections 1 and 10 by failing to respond to the requests for recorded information contained at points 4.5 to 4.7 of the complainant's letter. At paragraph 3 above the MoJ is now required to respond to points 4.5 to 4.7 in accordance with the requirements of the FOIA.

Section 12

18. Section 12(1) provides that a public authority is not obliged to comply with a request where it estimates that the cost of doing so would exceed the appropriate limit, which for the MoJ is £600. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "fees regulations") provide that the cost of a request must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours. The fees regulations also specify the

tasks that can be taken into account when forming a cost estimate as follows:

- Determining whether the requested information is held.
 - Locating the information, or a document which may contain the information.
 - Retrieving the information, or a document which may contain the information.
 - Extracting the information from a document containing it.
19. A public authority is required to estimate the cost of a request, rather than form an exact calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the MoJ was reasonable; if it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, section 12(1) applied and it was not obliged to comply with the request.
20. Turning to the reasoning of the MoJ for its cost estimate, it referred to representations it had given to the ICO in a previous case¹. In that case it referred to a sample it had taken of two months' worth of correspondence – March and April 2014 – which had shown that it had received 2,545 items of correspondence during that period. In this case the MoJ stated that it would be necessary to review each item of correspondence it had received during the period specified in the request to ascertain whether that correspondence fell within the parameters of the request. Its position was that the time taken to do this would be in excess of the limit.
21. The issues for the Commissioner to cover here are whether she accepts that it would be necessary to review each item of correspondence the MoJ had received during that period in order to comply with the request, and if so whether she accepts the figure provided by the MoJ of the volume of that correspondence.
22. As to whether it would be necessary to review every item of correspondence in order to comply with the complainant's request, the request specified correspondence addressed to the Secretary of State. The MoJ stated that it would not necessarily be the case that

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1040380/fs_50547400.pdf

correspondence addressed to the Secretary of State would be forwarded to the Secretary of State's private office and that it would be necessary to search for relevant correspondence that had been forwarded elsewhere.

23. The Commissioner notes that it would be commonplace within most sizeable organisations that correspondence addressed to the head of that organisation would be sent to the area within that organisation most suitable to provide a response rather than to the head personally. For example, it is common for the ICO to receive correspondence addressed to the Commissioner that would not be personally responded to by the Commissioner, instead it would be referred to the area within the ICO most appropriate to respond. The Commissioner accepts that it is reasonable to expect that a similar approach will be taken within government departments to correspondence addressed to the Secretary of State and that correspondence within the scope of the request is likely to have been sent to other areas within the MoJ rather than only the Secretary of State's private office. She also, therefore, accepts that it would be necessary to search through all items of correspondence received during the period specified in the request in order to comply with the request.
24. Notable as a potential basis for restricting the scope of the request is that in using the terminology "*letters*" and "*general post*" in his request, the complainant arguably limits the scope of his request to hard copy correspondence. This raises the issue that it could be possible to limit the time it would be necessary to spend searching for relevant information by only searching correspondence received in hard copy. The MoJ stated, however, that all correspondence received in hard copy is scanned, hence the first task of reviewing correspondence would be to check whether each item of correspondence held on its system had originally been received in hard copy through the post.
25. On the issue of the figure that the MoJ gave for the volume of correspondence that it receives, the Commissioner notes first that it is reasonable to expect that any central government department would receive a considerable volume of correspondence during any three month period. The figure in the previous case mentioned above was 2,545 received during a two month period. Although not a three month period as the MoJ suggested in its correspondence with the ICO about this case, the Commissioner accepts that this figure is useful in giving an indication of the volume of correspondence that the MoJ receives. As noted in the earlier decision notice, this gives a figure of approximately 1,250 items of correspondence that the MoJ could expect to receive per month.

26. Extrapolating from this a figure of approximately 3,750 items of correspondence that it would necessary to review in order to comply with the request, the Commissioner accepts that it was reasonable for the MoJ to estimate that the time and cost of locating and extracting the requested information would exceed the limit. Her conclusion is, therefore, that section 12(1) was engaged and so the MoJ was not obliged to comply with these parts of the request.

Section 16

27. Section 16(1) of the FOIA provides that all public authorities are under a duty to provide advice and assistance to any person who has made or who intends to make an information request to it. The Commissioner's published guidance on section 12² sets out the following minimum advice and assistance that a public authority should provide to a requester when refusing a request on cost grounds:

- either indicate if it is not able to provide any information at all within the appropriate limit; or
- provide an indication of what information could be provided within the appropriate limit; and
- provide advice and assistance to enable the requester to make a refined request.

28. In this case, whilst the MoJ stated it was not able to give any advice on refining the request, it went on to state that the complainant could significantly narrow the time period specified in the request and could specify correspondence received by a particular area of the department. The Commissioner accepts that in providing this advice the MoJ met the requirement of section 16(1).

Other matters

29. As noted above, the MoJ failed to carry out an internal review, despite the complainant having requested that it do so. This followed the earlier failure to respond to the request within 20 working days of receipt. The Commissioner's overall view is that the handling of this request by the MoJ was poor. It must ensure that it has appropriate procedures in place
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² https://ico.org.uk/media/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

to respond to requests promptly and to carry out internal reviews. A record has been made of the issue in this case and these may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

30. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

31. 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.
32. 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

Ben Tomes
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