

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested information about possession proceedings and possession orders from the Ministry of Justice (the "MOJ"). The MOJ refused to provide the requested information saying that to do so would exceed the appropriate limit at section 12(1) (cost of compliance) of the FOIA. The Commissioner's decision is that, in respect of parts (1) to (5) of the request it was entitled to rely on section 12(1). However, she does not agree that parts (6) and (7) can be aggregated with the rest. The following steps are required:
 - the MOJ should issue a fresh response in respect of parts (6) and (7) of the request.
2. 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 Act and may be dealt with as a contempt of court.

Background

3. The MOJ has provided the following background information about how it handles information in cases such as this.

"Caseman is a mainframe system used for the administration and handling of cases for the County Courts. Cases are stored according to a court reference number. There are roughly 2 million cases heard in the County Courts each year. In 2017, County Courts handled 2.05 million claims..."

Some statistics are available¹ but this does not include details at the level sought by the complainant".

Request and response

4. On 19 January 2018 the complainant wrote to the MOJ and requested information in the following terms:
 1. *How many possession proceedings were issued since 1 February 2016 on the basis of ground 7B, Schedule 2 Housing Act 1998?*
 2. *In how many of the above proceedings were the defendants legally represented?*
 3. *How many possession orders were made based on ground 7B, Schedule 2 Housing Act 1998?*
 4. *How many county court appeals ("s. 204 appeals") were made against such possession orders?*
 5. *How many of the s.204 appeals were successful (i.e. the possession order was overturned)?*
 6. *How many judicial reviews have been issued from 1 February 2016 to date against decisions by the Secretary of State for the Home Department to issue a notice of letting to a disqualified person and / or refuse to grant permission to rent?*
 7. *In how many of the above judicial reviews were the decisions / refusals of the Secretary of State for the Home Department quashed?*
5. The MOJ responded on 8 February 2018. It asked for clarification in respect of the term "Home Department" used in parts (6) and (7). It also confirmed holding the requested information for parts (1) to (5) but advised that to comply with these parts of the request would exceed the appropriate limit at section 12(1) of the FOIA.
6. On 13 February 2018 the complainant requested an internal review. In clarifying parts (6) and (7) of her request she also explained that "Home Department" was meant to be "Home Secretary".
7. Following an internal review, the MOJ wrote to the complainant on 1 March 2018. It maintained its position advising that parts (6) and (7) were also being refused on cost grounds.

¹ [https://www.gov.uk/government/statistics?departments\[\]=ministry-of-justice&keywords](https://www.gov.uk/government/statistics?departments[]=ministry-of-justice&keywords)

Scope of the case

8. The complainant contacted the Commissioner on 1 June 2018 to complain about the way her request for information had been handled. She was dissatisfied with the application of section 12(1) and the advice and assistance provided under section 16. She was also dissatisfied with the MOJ's response in respect of parts (6) and (7) saying:

"It is inappropriate for government departments to hold information that is poorly organised and inefficient, thereby making it more likely that it will be able to refuse FOIA requests for costs reasons. Public authorities are required under the Public Records Act to maintain records in an ordered and managed way that makes it easy to retrieve information when required. The MOJ should comply with the section 46 code of practice including the fact that it is good practice to maintain records electronically".

9. The Commissioner will consider the application of sections 12 and 16 below.
10. A response to the complainant's comments about compliance with the section 46 code of practice can be found in "Other matters" at the end of this notice.

Reasons for decision

Section 12(1) – cost of compliance exceeds appropriate limit **Section 12(4) – aggregation of related requests**

11. Section 12(1) of the FOIA allows a public authority to refuse a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244 ("the Fees Regulations").
12. Under section 12(4) of the FOIA, when a public authority is estimating whether or not the cost of compliance with the legislation would exceed the appropriate limit, 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.
13. Those conditions require the requests to be:
- made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;

- made for the same or similar information; and
- received by the public authority within any period of 60 consecutive working days.

14. The ICO guidance on the application of section 12² considers the aggregation of requests. The wording of Regulation 5 of the Fees Regulations – that the requests need only to relate “to any extent” to “the same or similar information” - provides for a broad interpretation when considering aggregation. The guidance says:

“...requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested”.

15. The complainant is dissatisfied that because one part of the request was refused on cost grounds the remaining parts were also refused; she disagrees with this interpretation of the FOIA.

16. Unfortunately, the MOJ’s position regarding the aggregation of all parts of the request has been unclear to the Commissioner throughout this investigation despite her repeated enquiries. In its response to her of 23 September 2018 it advised:

“Please see attached email which confirmed we are aggregating all questions as they have a referring theme”.

17. Although requested to do so, it did not explain what it considered the referring theme to be. Additionally, the “attached email” referred to did not confirm that all parts were being aggregated as it only referred to parts (6) and (7) of the request. However, with the lack of any clearer explanation, the Commissioner has proceeded on the basis that all parts of the request have been aggregated for the purposes of citing section 12(1) as per the formal response which included the “attached email”.

18. The Commissioner has therefore initially considered whether or not the MOJ was entitled to aggregate all seven parts of the request.

19. Clearly all parts of the request are made by the same party and were all made in one request on the same date. However, whilst the first five

²https://ico.org.uk/media/fororganisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

parts all relate to particular types of possession orders the latter two refer specifically to judicial reviews.

20. The Commissioner is therefore not satisfied that the MOJ was entitled to aggregate all seven parts of the request as she considers that they do not all have one overarching theme. She is however satisfied that the first five parts of the request relate to the same subject matter and she has been provided with sufficient detail to enable her to consider the application of section 12(1) to these parts below.

Parts (1) to (5) of the request

21. 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.
22. When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are:

- (a) *determining whether it holds the information,*
- (b) *locating the information, or a document which may contain the information,*
- (c) *retrieving the information, or a document which may contain the information, and*
- (d) *extracting the information from a document containing it."*

23. The Regulations state that the appropriate cost limit is £600 for central government, legislative bodies and the armed forces, and £450 for all other public authorities. The cost limit in this case is £600, which is equivalent to 24 hours' work.
24. Section 12 of the FOIA makes it clear that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the MOJ was reasonable; whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, that section 12(1) therefore applied and that it was not obliged to comply with the request.
25. In its refusal notice the MOJ explained to the complainant that it did not hold the requested level of detail in its electronic case management system. It advised her that:

"The information requested would be included in case files retained locally at individual courts but in order to obtain that data we would have to identify the files that possibly relate to these matters, draw

them, extract, record and collate the relevant information requested.

I believe that the cost of doing that would exceed the appropriate limit. Consequently, we are not obliged to comply with your request".

26. The MOJ has further explained to the Commissioner that its Caseman system, as referred to in "Background" above:

"... is used for administration and handling rather than resulting. County Court claims do not all have a Court "result" as a Criminal case or Tribunal Appeal might have as some Civil claims are not proceeded with, withdrawn, settled out of court etc. The details of claims are not centrally recorded although there is a "free form" field on the system where details of interest may be marked in any particular case. There is no business need for the details of claims to be recorded on Caseman and no designated part of the Caseman system for this. The claim details and their outcomes are recorded within the case files themselves at the respective Court concerned, in accordance with the Ministry of Justice Record Retention and Disposition Schedules.

County Court cases can be divided into monetary and non-monetary claims. The majority are monetary and include cases such as personal injuries, specified and unspecified money claims. In 2017, 1.75 million of the claims were monetary, the remainder being non-monetary.

The requested information here would fall under non-monetary claims, and more precisely rent possessions. The original estimated figure of 124k claims to be examined for 2016 can now be more precisely estimated at 132643 (for 2017 only) see:

(<https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-quarterly-april-to-june-2018>) Table 4, Claims issued".

27. The Commissioner is satisfied that the MOJ made its enquiries with appropriate personnel working within the Analysis and Performance Division of Her Majesty's Courts and Tribunals Service and also that there is no quicker way of obtaining the requested information other than as described above.

28. It is also noted that, when asking for an internal review, the complainant said:

"If ... you do hold some of the information requested in relation to questions one to five, please inform us of the extent of information

that you have available within the cost bracket that is permitted and we shall refine our request”.

29. In response to this point to MOJ advised that it:

“... is not required under FOIA to advise you how to structure questions so that they fall within the section 12 cost limits, nor is it obliged to answer an FOIA question up to those limits”.

30. The complainant is also of the view that the MOJ should have provided a representative sample, eg one case from each year, and stated to the Commissioner:

“In its response ... the MOJ suggested that we reduce the timescale to be covered by our questions. It did not, however, make any reference to the possibility of providing a sample of information across the full range of years that we had asked for. If the MOJ had complied with the recommendation in the ICO Guidance and offered to make such a sample available to us then we would have accepted the offer”.

She also added:

“Similarly the MOJ did not assist us to narrow down our search request at all, despite our specific request that it should do so in our letter of 19 January. This is wrong. It is against s.16 FOIA ...”.

31. In her guidance on the application of section 12³ of the FOIA the Commissioner states:

“A public authority is not obliged to search for, or compile some of the requested information before refusing a request that it estimates will exceed the appropriate limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate. It is good practice to give these arguments or evidence to the requestor at the outset to help them understand why the request has been refused”.

32. In its refusal notice the MOJ explained how the information was held and why it would not be possible to comply with parts (1) to (5) of the request within the cost limit. It also made suggestions as to how the complainant might revise her request. It told her that the information requested would be retained at individual courts and suggested that she

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

may wish to consider reducing the timescale covered by her request or she could specify particular Courts. At internal review it again suggested that she may:

"... wish to consider refining [her] request to restrict it to a much shorter time period, for example limiting it to a specific court for a specific month ...".

33. The Commissioner would also add that it is not for a public authority to 'second guess' what information might be acceptable to a requester where this differs from what they have requested. Provided that the public authority has explained what it holds and how it is held, it is for the requester to refine their request accordingly if they wish to do so. The Commissioner is therefore satisfied that the MOJ's approach was appropriate.

34. Her guidance further states:

"In practice, as soon as a public authority becomes aware that it intends to rely on section 12, it makes sense for it to stop searching for the requested information and inform the complainant. This avoids any further and unnecessary work for the public authority as it does not need to provide any information at all if section 12 is engaged".

35. Having considered the estimates provided the Commissioner finds that they are realistic and reasonable. Put quite simply, the outcomes of the cases which would need to be collated in order to respond to the request are not centrally recorded, the results only being retained within the individual files which are held at the relevant Court. She therefore accepts that to provide the information at parts (1) to (5) of the request would exceed the appropriate limit.

Parts (6) and (7)

36. As per her analysis regarding aggregation above, the Commissioner does not consider that these two parts of the request fall within the same overarching theme as the other five. They cannot be aggregated with those parts of the request and the MOJ is therefore required to respond to them separately.

Section 16 – advice and assistance

37. 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, albeit that the

Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.

38. In this case, in respect of parts (1) to (5) of the request the MOJ explained to the complainant about how the information is held and why compliance would exceed the limit. As mentioned above, it also suggested ways in which the complainant might refine her request in order to keep it within the cost threshold. The Commissioner is satisfied that it so doing it met with its obligations under section 16 for these parts of the request.
39. The MOJ has already indicated that the cost limit is likely to apply to parts (6) and (7) of the request too. If this is the case, when providing its response in line with the steps ordered in this decision notice, it should consider its obligations under section 16 and ensure that it clearly explains what it holds, how it is held and why disclosure would exceed the cost limit.

Other matters

Records management – section 46 Code of Practice

40. The complainant raised the following concerns regarding parts (6) and (7) of her request:

" ... it is very concerning that the government cannot provide the information requested because it is not held electronically to this level of detail. Section 46 code of practice states it is good practice to maintain records electronically. Therefore whilst we note that the ICO cannot require the MOJ to change its business practices, we request that it makes the comments and recommendations that it can in light of its own guidance and the increasing importance of concepts such as accountability and transparency under the GDPR".

41. As evidenced in the comments above, the complainant has already been advised by the Commissioner that these particular concerns are matters outside her jurisdiction. The FOIA cannot require a public authority to change its systems, although the Commissioner may make an adverse comment if she believes there is evidence of particularly poor record handling.
42. The Commissioner did ask the MOJ for its comments regarding the complainant's views and it advised her:

"This is an expression of opinion on behalf of the complainant. How HMCTS case management and management information systems are organised and the data that is recorded in them is a matter for

HMCTS / MoJ after taking into consideration many factors which are not open for the public domain”.

43. This was not particularly helpful as no explanation has been provided regarding how these particular records are retained and why this is appropriate for its business needs.

44. The Commissioner’s guidance⁴ on the section 46 code of practice for records management says the following in respect of the storage of records:

“... an authority should know what records it holds and where they are. It should ensure that records remain usable for as long as they are required.

An authority should decide the format for the storage of its records. It is likely to hold records and information in a number of different electronic and manual systems. The authority should ensure that appropriate storage and preservation arrangements are in place, especially if there are any specific legal requirements for particular records”.

45. Whilst how information is retained may mean it is not done so in a way which facilitates a particular information request under the FOIA, such as in this case here, the Commissioner does accept that a public authority is best placed to organise its records according to its own business needs. As the MOJ clearly knows where this type of information is held she does not consider that there is evidence of particularly poor record handling, albeit that how it is held may not assist the complainant.

46. As the MOJ is now required to provide a fresh response in respect of parts (6) and (7) the Commissioner is hopeful that this will elicit further details about how this information is held. Although this may also invoke the cost limit, the details provided with any estimate will hopefully give a clearer picture about how this type of information is retained and may also provide for a refined request to be made in the future.

⁴ <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

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

Carolyn Howes
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