

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2019

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

Decision (including any steps ordered)

1. The complainant requested a list of orders and judgments issued by a named Employment Tribunal Judge when sitting at a named tribunal. The Ministry of Justice (MoJ) denied holding the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the MoJ did not hold the requested information.
3. She requires no steps to be taken as a result of this decision.

Request and response

4. On 21 March 2019, the complainant wrote to the MoJ and requested information in the following terms:

"Please provide a full list of Orders and Judgements issued by Employment Judge [name redacted] while sitting at London South Employment Tribunal".
5. The request was made via the 'whatdotheyknow' website.
6. The MoJ responded on 4 April 2019. It denied holding the requested information.
7. Following an internal review, the MoJ wrote to the complainant on 20 May 2019, maintaining its position.

Scope of the case

8. The complainant contacted the Commissioner on 21 May 2019 to complain about the way his request for information had been handled.
9. The analysis below considers whether, on the balance of probabilities, the MoJ held information within the scope of the request.
10. The Commissioner notes that there is no timeframe specified in the request. However, the Commissioner understands that the Judge referred to in the request for information sat as a fee paid Employment Judge between 2005 and 2017.

Reasons for decision

Section 1 – general right of access

11. Section 1 of the FOIA states that:

"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."

12. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement whether, on the balance of probabilities, a public authority holds any information within the scope of the request.
14. In this case, the Commissioner has sought to determine whether, at the time of the request and on the balance of probabilities, the MoJ held information within the scope of the request.
15. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness

and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

The complainant's view

16. The complainant disputed that the MoJ did not hold the requested information. He told the MoJ:

"Contrary to your assertion that "the MoJ does not hold any information", the MoJ most obviously does have you have [sic] the information requested — the full list of Orders and Judgements issued [by the Employment Judge].

I presume your answer refers to the fact that you do not have a full list of Orders and Judgements issued [by the Employment Judge] already prepared. The law does require you to prepare such a list and provide it if so requested".

17. Similarly, he told the Commissioner:

"The fact that they do not "there is no business need to keep a full list of orders and judgments issued by [the Employment Judge]" does not in any way mean that HMCTS is not under a duty to prepare and provide this list if a FOI asking them to that is received".[sic]

The MoJ's view

18. In its initial correspondence with the complainant, the MoJ told him that it did not hold any information within the scope of his request. It explained:

"This is because there is no legal or business requirement for MoJ to do so".

19. The MoJ subsequently advised the complainant:

"... that prior to February 2017, individual case orders were kept in their case files at Bury St Edmunds, however these have since been destroyed owing to their 12-month retention schedule".

20. The MoJ also told him that since 2017 all Employment Tribunal judgements have been published on the internet and provided him with the relevant link. While the MoJ, in its correspondence, variously cited 'from February 2017 onwards' and 'as from August 2017', the Commissioner does not consider that the discrepancy in those dates has any bearing on her decision in this case.

21. During the course of her investigation, the Commissioner asked the MoJ to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the MoJ established whether or not it held the requested information.
22. In its submission to the Commissioner, the MoJ provided her with details of the searches it had conducted for the requested information. It described the searches that had been conducted for electronic records and confirmed that a manual search was carried out in the archive storage room.
23. With regard to whether any recorded information relevant to the scope of the complainant's request had been deleted or destroyed, the MoJ told the Commissioner:

"Although the MoJ held information regarding the request, this was destroyed in accordance with the Records, Retention and Disposal Schedule policy".
24. The MoJ provided the Commissioner with details of that policy. It also confirmed that there is no business purpose for the MoJ to hold a full list of Orders and Judgements issued by the Employment Judge concerned, and no statutory requirements upon the MoJ to retain the requested information.

The Commissioner's view

25. The Commissioner acknowledges that the complainant considers that the MoJ should *'prepare and provide this list'* in response to his request for information.
26. The Commissioner addresses such matters in her guidance to public authorities *'Do I have to create information to answer a request?'* In that guidance¹, the Commissioner recognises that a public authority may receive a request for a list or schedule where the list itself is not in existence. In those circumstances, she advises:

"In considering such a request you should remember that the FOIA and the EIR are about the provision of information held on record. Where it is possible to extract the information requested and

¹ https://ico.org.uk/media/for-organisations/documents/1159/information_from_original_sources.pdf

present it in the form of a list or schedule, this does not amount to the creation of new information”.

27. Having considered the MoJ’s response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the MoJ did not hold information within the scope of the request. She accepts that, while the MoJ had held relevant recorded information, it had been destroyed before the request was received in accordance with its policy.
28. The Commissioner therefore considers that the MoJ has complied with its obligations under section 1(1) of the FOIA.

Right of appeal

29. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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
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