

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2021

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested a copy of a named Crown Court's "Goldfax" logs showing transmissions received between 23 and 25 September 2020 and relating to a named claim. The Ministry of Justice said that it did not hold the requested information.
2. The Commissioner decided that, on the balance of probabilities, the Ministry of Justice does not hold the requested information. However, she found that the Ministry of Justice breached section 10(1) (Time for compliance) FOIA by failing to communicate this to the complainant within the statutory timescale.
3. The Commissioner does not require the Ministry of Justice to take any steps to comply with the legislation.

Request and response

4. On 14 October 2020, the complainant wrote to the Ministry of Justice (MOJ) at a named Crown Court and requested information in the following terms:

Re: FOIA/SAR (or just plain) request

Dear Sir/Madam:

I would like to receive a copy of your GoldFax logs (08707394144) showing transmissions received between 23/9/2020 and 25/9/2020 and relating to claim [reference redacted]. A copy of the actual document transmitted will do, as well as any other document providing the same information as the logs.

This is a request for the information on the logs rather than the logs themselves.

I would appreciate a quick response to this request.

5. After a substantial delay, MOJ replied on 17 February 2021 to say that the information requested was not held. Following an internal review, MOJ confirmed the decision on 19 March 2021.

Scope of the case

6. On 16 December 2020 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that MOJ's Crown Court had ignored his request and a complaint filed seven weeks later as well. MOJ had later refused his request.
7. In her investigation, the Commissioner considered representations she received from MOJ and the complainant. She has investigated MOJ's contention that it did not hold the requested information. She offered the complainant informal resolution of the matter which he declined.

Reasons for decision

8. Section 1(1) FOIA states that any person requesting information is entitled to be informed by a public authority whether or not it holds that information and, if so, to have that information communicated to them unless it is otherwise exempted.
9. In this matter, the complainant considered it likely that MOJ held the requested information which MOJ denied. In cases where there is some dispute about the amount of information located by a public authority, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities to determine whether it was likely, or unlikely, that the public authority held the requested information.

The parties' representations

10. In his representations to the Commissioner the complainant said that, despite the wording of his request, the name of the fax system used by the MOJ was irrelevant. He added:

"Whether MOJ used Goldfax, Silverfax or Pinkfax is irrelevant. What is relevant is that MOJ were using fax software that keeps logs containing metadata. It is that metadata which is the subject of this request."

11. MOJ told the Commissioner that the reason the information was not held was that its GoldFax system was no longer in use in the courts in September 2020, the time period the requestor had specified. The system had been decommissioned in early 2019. The request specified information held on "GoldFax" logs and so MOJ believed their response that the requested information was not held, had been correct. However MOJ recognised that they had not made clear that the decommissioning of Goldfax was the reason for that response. In that respect, MOJ's response had been less helpful than it might have been and, in representations to the Commissioner, MOJ apologised for this oversight.
12. During the Commissioner's investigation, MOJ explained to her that there was no formal business-wide records policy for the retention of faxes. However, the relevant court used a local retention policy due to inbox size restrictions and the volumes of faxes received. The successor system to Goldfax had been configured to retain electronic data for faxes sent and received over a period of 30 days; records that were more than 30 days old were deleted.
13. MOJ confirmed to the Commissioner that a search of email boxes had been carried out, in both personal and shared accounts, including searches for the complainant's name and the relevant claim number. The requested information, including metadata, was not held. There were no copies in other locations nor was any back-up available anywhere.
14. MOJ added there were no business reasons or statutory requirement to retain records of faxes sent for more than 30 days. Records were not kept beyond the 30 day retention period.

The Commissioner's decision

15. In her investigation, the Commissioner found that MOJ had contacted its relevant business unit to consider whether or not the requested information was held and that none had been located. She also found that the searches MOJ had conducted would have been likely to locate any of the requested information still held.

16. On a narrow interpretation of the request for "Goldfax" information it is clear that none had been held on the dates the complainant specified. MOJ plainly did not hold the "Goldfax" information requested.
17. However, a broader interpretation of the request can be made. The complainant's later correspondence, for example his "Pinkfax" comments to the Commissioner, suggest strongly that a wider view of the request could and should have been taken. An objective reading of the request suggests strongly that the complainant wanted the metadata from the relevant faxes sent and received by the Court during a specified period, that related to a matter that was of concern to him, albeit there may have been uncertainty about exactly what it was that the complainant wanted to achieve.
18. The Commissioner considers that a public authority must answer a request based on what the requester has actually asked for, and not on what it thinks they would like, should have asked for, or would be of most use to them. Where there is uncertainty, the authority should offer advice and assistance to help the requester to clarify the request or submit a new request for different information. The Commissioner's position is set out in more detail in her relevant guidance concerning interpreting and clarifying a request¹.
19. It follows that MOJ could have resolved the uncertainty concerning what the complainant wanted by offering advice and assistance as MOJ are required to do by virtue of section 16(1) FOIA (Duty to provide advice and assistance).
20. The Commissioner also investigated the timing of events in the light of her own guidance on the retention and destruction of documents².
21. Section 1 FOIA (General right of access) provides 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, ...*

¹ <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

² <https://ico.org.uk/media/for-organisations/documents/1160/retention-and-destruction-of-requested-information.pdf>

1(4) The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

22. Also germane is section 10(1) FOIA (Time for compliance) which provides that:

“Subject to subsections (2) and (3), 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.”

23. In the context of section 1(4) FOIA, the Commissioner interprets the reference to “promptly” in section 10(1) FOIA to mean that, where requested information is scheduled for deletion before a response is due to be issued, if the public authority is in a position to respond earlier than the statutory twenty working day time limit, and at that point the information is still held, the authority should provide the information.

24. The Commissioner considers that if information is held when a request under FOIA is received, a public authority may lawfully be able to say that it does not hold the information if it would normally be destroyed before the deadline for responding. However, the authority should, if possible and as a matter of good practice, suspend any planned destruction and consider the request as usual. This means that a public authority does not have to release information under FOIA if it is scheduled to be destroyed under its usual disposal schedule before the time for compliance with the request expires.

25. During her investigation, the Commissioner reviewed the timing of the request, MOJ’s responses, and the relevant document retention policy. She noted that the faxes of interest to the complainant had been dated 23 – 25 September 2020 and the MOJ retention and destruction policy provided for them to be destroyed on 25 October 2020.

26. The complainant made his information request on 14 October 2020. The 20 working day deadline for MOJ to respond to it, as specified in section 10(1) FOIA, expired on 11 November 2020. This was after the due date for destruction of 25 October 2020. In the event, MOJ issued its FOIA refusal notice on 16 February 2021.

27. Since any relevant MOJ metadata information which might have been held when the request for information was received would have been deleted before the time for compliance had elapsed, MOJ were lawfully able to say - in the light of section 1(4) FOIA - that they did not hold the information.
28. Accordingly, and based on the information MOJ provided, the Commissioner decided, on the balance of probabilities which is the test she must use, that no recorded information within the scope of the request was held. She also decided therefore that MOJ had complied with the requirements of section 1(1)(a) FOIA.

Section 10 - (Time for compliance)

29. Section 1(1) FOIA provides that an individual who asks for information is entitled to be informed whether or not the information is held and, if the information is held, to have that information communicated to them.
30. Section 10(1) 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.
31. The request in this case was submitted on 14 October 2020 and received by MOJ on 15 October 2020. However, MOJ did not provide a substantive response until 16 February 2021, well past the statutory limit.
32. In evidence to the Commissioner, MOJ explained that the reason for the delay in responding to the request was that the MOJ business unit did not address the request promptly. The MOJ FOIA unit had not become aware of the request until notified by the Commissioner, acting on behalf of the complainant, on 25 January 2021. MOJ acknowledged that they should have acted much sooner and should have apologised to the requester for the oversight and consequential delay and do so now.
33. The Commissioner therefore decided that MOJ had breached section 10(1) FOIA by failing to comply with section 1(1) FOIA within the statutory time period but that no remedial action is now feasible.

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Dr Roy Wernham
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Wycliffe House
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SK9 5AF