

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 December 2021

**Public Authority:** Crown Prosecution Service  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the costs of a specified court case. The Crown Prosecution Service (the 'CPS') provided some of the information and denied holding the remainder.
2. The Commissioner's decision is that, on the balance of probabilities, the CPS does not hold the remaining requested information.
3. No steps are required as a result of this notice.

#### Background

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4. The complainant's request of 1 July 2019 that is the subject of this notice, has been considered and investigated by the Commissioner resulting in two previous decision notices.
5. The first decision notice<sup>1</sup> of 18 November 2019 found that the CPS was not entitled to rely on section 14(2) (repeat request) of FOIA to refuse the request and it ordered the CPS to issue a fresh response that did not rely on section 14(2).

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616424/fs50874299.pdf>

6. The CPS complied with that decision notice and issued its fresh response on 18 December 2019. It refused to confirm or deny holding information within the scope of the request, saying that, if it held any information it would be the complainant's own personal data. It therefore relied on section 40(5A) (personal information) of the FOIA to withhold the information.
7. Following the Commissioner's further investigation, a second decision notice<sup>2</sup> was issued relevant to this request on 26 November 2020. The Commissioner found that that the CPS was not allowed to rely on section 40(5A) of FOIA to neither confirm nor deny holding information within the scope of the request. The CPS was ordered to confirm or deny whether it held the requested information and to provide it or issue a refusal notice which did not rely on section 40(5A) of FOIA.
8. The CPS complied with the second decision notice and its response is set out in the following section.

## Request and response

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9. On 1 July 2019, the complainant wrote to the CPS and requested information in the following terms:

*'In Appeal Reference: EA/2018/0095 published at <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2328/015%20071218%20Decision.pdf> the following is stated at paragraph 1:*

*"On a date which it is not necessary to specify, criminal proceedings were brought by OP, the Appellant, against two individuals, QR and ST. Those proceedings were taken over by the Crown Prosecution Service ('CPS') and discontinued. That action was challenged by the Appellant through the medium of judicial review, which was successful. The prosecution was then resumed but subsequently, for a second time, taken over by the CPS and discontinued."*

*I hereby request the following information under the Freedom of Information Act: A breakdown of the costs to the CPS of dealing with the judicial review mentioned above. Please include the*

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618725/ic-43758-d6n6.pdf>

*notional cost of staff time spent on dealing with the case, and the cost of any external counsel. While I appreciate the same request was submitted to you in December 2018, I believe sufficient time has now elapsed such that the reasons you had for refusing that request will no longer be material.'*

10. The CPS responded on 31 December 2020. It provided the cost of counsel details and denied holding some of the requested information, stating:

*"The CPS does not record time spent by internal lawyers, paralegals and administrative staff on a case by case basis."*

11. The complainant requested an internal review on 17 January 2021. The CPS provided its internal review, late, on 16 March 2021 in which it maintained its original position as set out in its response of 31 December 2020.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 18 March 2021 to complain about the way his request for information had been handled. His grounds of complaint included the following:

*"Following service of DN [decision notice] IC-43758-D6N6 the CPS disclosed some, but not all, of the information sought. The CPS maintains that it has provided 'the only cost information that is held by the CPS', however realistically further records would be held. I can only conclude the CPS has performed inadequate searches."*

13. The Commissioner has considered whether, on the balance of probabilities, the CPS holds any further requested information beyond that already provided.
14. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

## Reasons for decision

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### Section 1 – general right of access

15. Section 1(1) of 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."*

16. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.

17. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

18. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the CPS holds any further information relevant to the request that it has not already disclosed to the complainant. He asked the CPS about the searches it had undertaken to in order to respond to the request.

19. In reply, the CPS said with the assistance of the Appeal Unit lawyers, Senior Management and prosecution area, searches were conducted on its various IT systems and drives and advised the Commissioner that nothing is held.

20. The CPS has been specific in terms of exactly what systems and drives have been searched and how those searches were carried out, but has asked the Commissioner not to reproduce these details in his notice for reasons of keeping that information confidential. The Commissioner has

respected the CPS' request on this occasion and is satisfied that it has conducted appropriate and relevant searches in order to respond to the request.

21. The CPS said that if any further information were held, it would be held electronically or in hard paper copies. The CPS advised that it was unable to definitively confirm whether the remaining requested information was ever held or whether it had ever held a record of the remaining information's destruction. In relation to its own records management policy and whether there is a business purpose to hold the remaining information, the CPS told the Commissioner:

*"The CPS does not require that every CPS prosecution case must have the recorded cost regarding the time spent on the case by the CPS staff. If information of this type was held on a case then it would be held for the length of the retention policy for the type of offence and sentence received."*

22. In response to the Commissioner's question as to whether there is a statutory requirement for the remaining information to be held, the CPS provided an explanation which it asked the Commissioner not to reproduce in his decision notice. Similarly, the CPS provided the Commissioner with details about the method used to calculate staff costs and further background context detail as to why it is not required to record staff costs other than for counsel, which it has stated should also remain confidential.
23. The Commissioner has respected the CPS' request not to reproduce certain parts of its investigation response, but has taken the additional explanations given into account in reaching his decision.
24. The Commissioner considers that the CPS has been honest in saying that it cannot definitely confirm whether the remaining requested information was ever held or destroyed. If this detail is not recorded anywhere, he accepts that a public authority cannot definitely say whether the requested information was ever held. However, the Commissioner's task is to determine whether, on the balance of probabilities, the CPS held the remaining requested information at the time of the request.

### *Conclusion*

25. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it must hold, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.

26. The Commissioner has sought and secured explanations about the searches undertaken, how the CPS approaches staff costs, and why it is not necessary to record all staff costs, in order to satisfy himself as to what information is held.
27. Based on the explanations provided by the CPS, the Commissioner is satisfied, on the balance of probabilities, that no recorded information is held for costs relating to internal lawyers, paralegals and administrative staff who worked on the case specified by the complainant.

## **Other matters**

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28. In this case, the complainant requested an internal review on 17 January 2021. The CPS did not provide its internal review until 31 March 2021.
29. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
30. Part 5 of the section 45 Code of Practice<sup>3</sup> (the 'Code') states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
31. Although requested to do so by the Commissioner as part of his investigation, the CPS did not provide any response as to why the internal review was late in this case.
32. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "*Openness by Design strategy*"<sup>4</sup> to improve standards of

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<sup>3</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

<sup>4</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "*Regulatory Action Policy*"<sup>5</sup>.

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<sup>5</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

**Right of appeal**

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33. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.

35. 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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