

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2022

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

Decision (including any steps ordered)

1. The complainant requested specified policy and procedural information relating to the Judicial Conduct Investigations Office (the 'JCIO'), which falls under the remit of the Ministry of Justice (the 'MOJ'). In response, the MOJ provided some of the requested information and said that section 21 (information accessible to applicant by other means) of FOIA applied to the remainder. The complainant disputed that all the requested information held had been provided and did not agree with the MOJ's reliance on section 21.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 21 of FOIA to withhold some of the requested information. The MOJ identified further information falling in scope during the course of the Commissioner's investigation which it disclosed to the complainant. On the balance of probabilities, the Commissioner is now satisfied that the MOJ holds no further information in scope of the request. However, the MOJ failed to issue its refusal notice and to inform the complainant, within 20 working days, that it did not hold some of the requested information and therefore breached sections 10(1) and 17(1) of FOIA.
3. No steps are required as a result of this notice.

Background

4. The JCIO assists the Lord Chancellor and the Lord Chief Justice in their joint responsibility for judicial discipline. The JCIO is responsible for undertaking enquiries when a complaint has been made about a judicial officeholder.
5. The MOJ explained that, although the JCIO is an independent body, its staff are civil servants employed by the MOJ. JCIO staff are therefore subject to the same behavioural requirements as all other civil servants and the conduct and discipline policies of the MOJ.
6. The MOJ told the Commissioner that, on 15 March 2021, the complainant submitted a complaint to the JCIO. In accordance with the statutory rules that govern how complaints are handled, this complaint was rejected on 24 March 2021.
7. Whilst the Commissioner does not need to know the detail of the aforementioned complaint, he has referenced it here given the complainant's FOIA request that followed on from it.
8. The request was handled by the JCIO on behalf of the MOJ. This notice references the MOJ throughout since the JCIO falls within its remit.

Request and response

9. On 8 June 2021, the complainant wrote to the MOJ and requested information in the following terms:

"Please, therefore urgently provide a copy of all documents held by the JCIO related to the JCIO's complaints procedures, including but not limited to, JCIO policies, rules, codes of practice, monitoring, training, including all those which relate to instructing and informing JCIO staff/employees on how to comply with the procedure, practice, policies."
10. Following the complainant's reminder email of 26 August 2021, the MOJ responded, late, on 28 September 2021. The Commissioner notes that the MOJ had sent a 'holding' letter to the complainant on 7 September 2021 and apologised for overlooking the request.
11. In its substantive response of 28 September 2021, the MOJ provided some information within the scope of the request but refused to provide the remainder (relating to Codes of Practice and complaints). It cited the exemption at section 21 of FOIA (information accessible to applicant by other means), and provided the relevant URLs. Specifically, the MOJ said:

"I have interpreted your request to mean the documents that relate to complaints made about the personal conduct of Judicial Conduct Investigations Office ('JCIO') staff. I can confirm that the MOJ holds some of the information that you have requested and I have provided it attached. The attachments are explained as follows:

- As MOJ employees, JCIO staff are expected to behave in accordance with the MOJ Conduct Policy (copy attached).
- Complaints about staff members should be made to the relevant line manager. If a complaint is then assessed as requiring formal investigation, the matter would be investigated under the MOJ Discipline Policy and Guidance (copy attached).

Some of the information you have requested (relating to codes of practice and complaints) is exempt from disclosure under section 21 of the FOIA, because it is reasonably accessible to you at the following links:

<https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>

You can find further information about how to make a complaint about MOJ staff at:

[https://www.gov.uk/government/organisations/ministry-of-justice/about/complaints-procedure.](https://www.gov.uk/government/organisations/ministry-of-justice/about/complaints-procedure)"

12. The complainant requested an internal review on 29 September 2021 focussing on the delay with the MOJ's response and issues with the links/some out of date information it had provided.
13. The MOJ sent the complainant the outcome of its internal review on 27 October 2021. It upheld its original position but acknowledged the delay in responding to the request. The MOJ explained that the second link above had been provided in error, advising it:

'... was not relevant to JCIO staff because it relates to complaints about staff based in the Ministry of Justice headquarters. The JCIO is based at the Royal Courts of Justice. I acknowledge that this was additional information provided in error, however, the response correctly informed you how to complain about a JCIO staff member:

"Complaints about staff members should be made to the relevant line manager. If a complaint is then assessed as requiring formal investigation, the matter would be

investigated under the MOJ Discipline Policy and Guidance”.’

14. The MOJ said that the ‘out of date’ detail and ‘dead’ links would be brought to the attention of the teams responsible for the two documents disclosed in response to the request, and stated:

“I am nevertheless satisfied that disclosure of the documents to you was FOIA-compliant, because they are the latest versions.”

Scope of the case

15. The complainant contacted the Commissioner on 4 November 2021 to complain about the way his request for information had been handled. He complained about the delay, the inaccuracy of some of the information/web links within the disclosed information and the MOJ’s reliance on section 21. He also said that he believed more recorded information must be held.
16. The Commissioner advised the complainant that he cannot consider issues of accuracy, explaining that his remit is only to determine what, if any, recorded information is held in relation to requests and whether any exemptions apply to some or all of that information.
17. During the course of the Commissioner’s investigation (on 8 February 2022), the MOJ identified and disclosed additional information in scope of the request. Specifically, it released a copy of the grievance policy together with some PowerPoint training slides entitled ‘Dealing with Conduct Issues and Grievances’. Parts of the PowerPoint presentation were redacted under section 40(2) – the exemption for personal information.
18. That same day, the Commissioner wrote to the complainant seeking his view following the disclosures. He also asked the complainant to advise whether he wished the section 40(2) redactions to be investigated.
19. On 9 February 2022, the complainant provided his view. He maintained that further information must be held and confirmed that he did not wish the Commissioner to investigate the redactions. The Commissioner has, therefore, not considered the MOJ’s reliance on section 40(2) any further.
20. Since then, there have been extensive and prolonged exchanges between the Commissioner and both the complainant and the MOJ with a view to identifying exactly what information he is seeking and what information he considers has not been provided. As a result of this process, the Commissioner has been made aware of previous related

requests submitted by the complainant to the MOJ and of its responses. The Commissioner will set out details of the key exchanges below as he considers these of relevance to this request.

21. On 9 March 2022, the complainant provided the following clarification in relation to the intended scope of his request:

“Scope

The request essentially contained two parts:

- Please, therefore urgently provide a copy of all documents held by the JCIO related to the JCIO's complaints [**about itself**] procedures, including but not limited to, JCIO policies, rules, codes of practice, monitoring, training. And:
 - [training re the above] including all those which relate to instructing and informing JCIO staff/employees on how to comply with the procedure, practice, policies.”
22. The Commissioner asked the MOJ whether the above would alter its handling of the request in any way. On 30 March 2022, the MOJ replied as follows:

“We have looked in to this in relation to the scope of [the complainant’s] request and we do not think it changes our position. However, the scope below is highlighted as being about itself. As explained, we have taken this to mean complaints about JCIO staff. We have provided:

- MoJ Conduct policy
- MoJ Disciplinary policy and Guidance
- Civil Service Code of practice
- MoJ Grievance Policy and Guidance
- Training slides

If [the complainant] is meaning complaints about the JCIO as an organisation then there is no held information on how this would be handled, complaints of this nature would be referred to senior managers. When complainants are unhappy with the way their complaint has been handled then they are referred to the Judicial Appointments and Conduct Ombudsman who then investigate their concerns.”

23. On 4 April 2022, the Commissioner wrote to the complainant regarding this and including the following:

"It is my intention to proceed with the decision notice as set out to you in a previous email unless you tell me that the MOJ has misinterpreted your request and you clearly set out exactly what you are requesting and how this differs to the MOJ's interpretation by the end of this week (ie by 8 April 2022); thank you."

24. In response, the complainant submitted a further letter that same day. Having reviewed the content of the letter, the Commissioner wrote to him as follows:

"Thank you for your letter and prompt reply. I want to make sure I've correctly understood what you have set out. It appears that you're seeking a copy of the JCIO's FOIA and EIR internal review procedures in addition to the information already provided by the MOJ in response to your request of 8 June 2021.

It also appears that you are seeking further clarification in relation to the website relied on by the MOJ citing section 21 for part of your request. I note that the MOJ has provided the direct links to the information so this question does not seem to be material to the complaint. Section 21 of FOIA requires that a public authority holds the requested information for which it is citing section 21 and that that information is "reasonably accessible" to the applicant.

Please can you confirm if my understanding is correct – if not please briefly set out your intended position (bullet points will suffice); thank you."

25. The complainant provided his view of the above email on 4 May 2022 by letter. He raised concerns about the JCIO having its own website and considered there is uncertainty about whether the documents are held by the JCIO or held on its behalf by the MOJ. He said that for section 21 to be claimed, the documents should be available on the JCIO's website. He did not respond to the Commissioner's enquiry as to whether or not he was seeking a copy of the JCIO's FOIA and EIR internal review procedures, if one is held, so this will not be further considered.
26. He also made a general comment that he considers the MOJ has not complied with the requirements of FOIA, the EIR and the Data Protection Act in relation to information rights. The Commissioner has commented on this latter point in the 'Other matters' section at the end of this notice.
27. In addition, he reiterated his view that the request should be considered under the EIR. The Commissioner had previously addressed this point with the complainant in earlier correspondence and he had accepted, in

writing, the Commissioner's explanation. The Commissioner has, therefore, not considered this aspect any further in this notice.

28. In this case, the Commissioner has considered whether, on the balance of probabilities, the MOJ holds any other information relevant to the request. He has also considered whether the MOJ was entitled to rely on section 21 and examined the reason for the delay in this case.
29. 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

Section 21 – information accessible to the applicant by other means

30. Although referenced in the earlier paragraph pertaining to the internal review, for clarity the Commissioner has set out below the response given to him by the MOJ about the information exempted under section 21:

"The information excluded under section 21 FOIA was the Civil Service Code. This information is freely available to [the complainant] and any other member of the public who has access to an internet connection.

To be helpful to [the complainant], we provided him with the following links:

<https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>

<https://www.gov.uk/government/organisations/ministry-of-justice/about/complaintsprocedure>

We subsequently acknowledged in our IR [internal review] that the second link was not relevant as this relates to making a complaint about staff based in MOJ headquarters. This does not apply to JCIO staff who are based at the Judicial Office, Royal Courts of Justice."

31. Section 21 of FOIA states that:

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

32. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.

33. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect.

34. In the Commissioner’s guidance¹ for section 21 of FOIA, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. That is, in order to be exempt, the requested information must be reasonably accessible ‘to the applicant’. Unlike consideration of most other exemptions in FOIA, this allows the public authority to take the individual circumstances of the applicant into account.

35. In effect, a distinction is being made between information that is reasonably accessible to the particular applicant and the information that is available to the general public. In order for section 21 to apply, there should be another existing, clear mechanism by which the

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

particular applicant can reasonably access the information outside of FOIA.

36. Information is only reasonably accessible to the applicant if the public authority:
- knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 of the FOIA in this context, the key point is that the authority must be able to provide directions to the information.
37. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)* states that for section 21 to apply, it is necessary to consider whether all of the information is 'reasonably' accessible to the complainant.
38. The MOJ stated that the Civil Service Code was last updated in March 2015 and it provided a weblink to where this is available. It noted that the complainant had made no reference to any particular circumstances that may prevent him from accessing this information. It also said the complainant had been communicating with the (JCIO) MOJ via email and that the response had been sent to him in an electronic format so it considered that he would have some internet access. Furthermore, the complainant has not referred to any particular reason why he cannot access the information.
39. The JCIO falls within the umbrella of the MOJ. In this case, the complainant has argued that information falling in scope of his request should be available on the JCIO's own website as opposed to the MOJ's website. The Commissioner does not consider it within his remit to determine how information is made available or which website the JCIO chooses to use. The key point here is that information held by the JCIO is also held by the MOJ given that the JCIO falls within the MOJ's remit. Furthermore, the MOJ's links provided to the complainant lead to the Civil Service Code and this Code appears on its website.

Conclusion

40. Notwithstanding the complainant's issue with some of the out-of-date content contained within the exempted information, the Commissioner is satisfied that the Civil Service Code is reasonably accessible to the complainant. It follows that the Commissioner has concluded that the MOJ was, therefore, entitled to rely on section 21 of FOIA to withhold it.

Section 1 – general right of access

41. 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.”

42. The Commissioner is mindful that when he 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.

43. 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.

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

45. In order to respond to the request, the MOJ told the Commissioner it had:

- Searched the JCIO shared drive for any relevant documents (none found).
- Searched Judicial Office intranet and located the MOJ Conduct Guidance and Discipline Policy and Guidance.
- Consulted the JCIO Head of Operations about any other documents that may be relevant.

- Emailed Judicial Office Privacy and Data Protection officer to find out who to contact about potentially disclosing these MOJ documents.
 - Emailed the MOJ Operations Manager and Correspondence Lead to ask about any other documents that may be relevant and whether the MOJ Conduct Guidance and Discipline Policy and Guidance could be disclosed. (The response to this request (from the MOJ People Group Policy team) confirmed that they cannot answer in relation to specific JCIO policies but that these two documents and the Civil Service Code may be relevant to the scope of the request. The MOJ policy team confirmed these could be disclosed).
46. As part of its internal review, the MOJ said it had undertaken the following:
- Searched the JCIO shared drive.
 - Electronic search on the Judicial Office intranet.
 - Electronic search on the MOJ intranet.
 - Discussion between the senior casework manager who answered the request and the senior casework manager who conducted the internal review.
47. The MOJ told the Commissioner that all records are held electronically and that it had conducted searches using the search terms “conduct” and “discipline”. It confirmed that no information relevant to the request had been deleted and explained that the business purpose for holding such information is to inform MOJ employees of the behaviour expected in the workplace and how to raise a complaint.
48. The MOJ advised that the statutory basis for the management of the Civil Service is set out in Part 1 of the Constitutional Reform and Governance Act 2010.
49. As per the ‘Scope’ section, further information was identified as being within the scope of the request during the Commissioner’s investigation and was disclosed to the complainant, namely the Grievance Policy and PowerPoint training slides.

Conclusion

50. 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 holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set

out earlier, the Commissioner is required to make a finding on the balance of probabilities.

51. The complainant has not submitted any specific arguments as to why he believes there may be further information held relevant to his request. Based on the explanations provided by the MOJ, the Commissioner is satisfied, on the balance of probabilities, that no further recorded information within the scope of the request is held.

Procedural matters

Section 10 – Timeliness

Section 17 – Refusal of a request

52. Section 10 of FOIA states that responses to requests made under the Act must be provided “promptly and in any event not later than the twentieth working day following the date of receipt”.
53. The complainant made his request on 8 June 2021 and did not receive a response until 28 September 2021 some 79 working days later. The Commissioner notes the MOJ included the following apology in its substantive response:

“I apologise that this response is late. Your request was overlooked and therefore not addressed until you sent a further email chasing a response on 7 September.”

54. In response to the Commissioner’s investigation, the MOJ said:

“...the request was made in an email which [the complainant] had sent in reply to an earlier FOIA response [reference redacted]. This was sent to a specific JCIO staff member who had emailed him directly. Whilst the request was made at the end of the email, it did say “Urgent Information Request” but unfortunately, this was overlooked as a result of simple human administrative error. As soon as the issue came to light as a result of [the complainant] chasing a response on 26 August, the request was processed. [The complainant] received an apology for the delay”.

55. Notwithstanding the above explanation, the MOJ failed to comply with section 1(1)(a) in not confirming to the complainant, within 20 working days, that it held the requested information. The MOJ is therefore in breach of section 10(1) of FOIA.
56. Section 17(1) of FOIA states:

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to

the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies”.

57. Therefore a public authority that is relying on a claim that the requested information is exempt information must provide the applicant with an appropriate refusal notice within the time for complying with section 1(1) ie within 20 working days.
58. In this case, the provision of any kind of response exceeded 20 working days and therefore the Commissioner also finds a breach of section 17(1).

Other matters

59. In this case, the MOJ failed to provide its substantive response within the statutory 20 working days’ time limit. Although the Commissioner notes and accepts the explanation given by the MOJ for the delay in this case, he has noted that the complainant had to wait 79 working days for his response. The Commissioner has made a record of and reason for this delay.
60. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft “Openness by Design strategy”² to improve standards of 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 his “Regulatory Action Policy”³.
61. The complainant said he considers the MOJ has been non-compliant over a number of years in relation to information rights (see paragraph 26 of the ‘Scope’ section of this notice). The Commissioner cannot consider

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

generalised allegations without the provision of supporting evidence. However, he does record instances of non-compliance across FOIA, the EIR and the DPA and will take appropriate action when necessary.

62. Given the difficulties both the MOJ and the Commissioner have experienced in trying to establish exactly what information the complainant is seeking in this case, he might find it helpful to review the Commissioner's guidance⁴ on how to best word information requests.

⁴ <https://ico.org.uk/your-data-matters/official-information/#word>

Right of appeal

63. 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

64. 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.

65. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF