

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2024

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

Decision (including any steps ordered)

1. The complainant has requested information regarding drug testing and security scanning on members of staff from the Ministry of Justice (the MoJ). The MoJ advised that some of the requested information was not held and relied on section 12 of FOIA (cost of compliance) to refuse the remaining parts of the request.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities the MoJ does not hold any information within the scope of question 1.
 - The MoJ was entitled to rely on section 12(1) of FOIA to refuse the request.
 - The MoJ complied with its section 16 obligation to offer advice and assistance.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 26 October 2023, the complainant wrote to the MoJ and requested information in the following terms:

“1. Since February 2017, how many staff have been drug tested year on year. How many have failed year on year. What drugs they have tested positive for year on year. How many of those staff have been sacked for failing drug tests year on year?”

2. Since February 2017 when were the security scanners brought into Berwyn’s reception area. How many staff have been security scanned year on year. How many of those staff scanned were scanned based on intelligence. How many staff were found with illicit items on them year on year. What the items found were year on year. How many staff were arrested, criminalised for items found year on year. How many staff have been sacked year on year for items found?”

5. On 23 November, the MoJ responded. It relied on section 12 of FOIA to refuse the request – a position it upheld following an internal review.

Scope of the case

6. During the Commissioner’s investigation the MoJ wrote to the complainant and revised its position clarifying that it did not hold the information requested question 1 of the complainant’s request.
7. The MoJ maintained that providing the requested information for part 2 of the request would exceed the appropriate limit and it was therefore entitled to rely on section 12(1) to refuse that question.
8. The Commissioner considers the scope of his investigation is to determine on, the balance of probabilities, whether the MoJ holds any additional information within the scope of the request. The Commissioner will also consider whether the MoJ was entitled to rely on section 12(1) when refusing question 2 of the request.

Reasons for decision

Section 1 – Information held

9. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
10. In relation to question 1 of this request, the MoJ explained that members of staff are not drug tested and therefore the requested information for question 1 is not held.
11. The MoJ explained to the Commissioner that it was able to determine this by discussing the matter with the head of business assurance. The head of business assurance confirmed that staff were not drug tested. As the head of business assurance was able to confirm that drug testing did not take place within the MoJ, no searches were carried out for the requested information at question 1.
12. Based on the above explanation, the Commissioner is satisfied that, on the balance of probabilities, the MoJ does not hold any information within the scope of question 1.

Section 12(1) – cost of compliance

13. The following analysis covers whether complying with question 2 would have exceeded the appropriate limit.
14. Section 12(1) of the FOIA 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” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
15. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the MoJ is £600.

16. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the MoJ.
17. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it; •
retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
18. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. The Commissioner considers that any estimate must be sensible, realistic and supported by cogent evidence. The task for the Commissioner in a section 12 matter is to determine whether the MoJ made a reasonable estimate of the cost of complying with the request.
19. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
20. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

The MoJ's position

21. [REDACTED]
22. [REDACTED]
23. [REDACTED]
24. [REDACTED]
25. The MoJ advised that it conducted a sampling exercise over three days which allowed it to estimate that on average there were 6 "finds" per

day. A member of staff was then required to locate and assess one of the "finds" for that day. The MoJ confirmed it took a member of staff approximately 2 minutes to assess each record for the requested information.

26. As the request spans over 6 years, the MoJ explained that there would be an estimated 15,000 electronic records which would need to be reviewed. At a rate of 2 minutes per record, this would amount to a total of 500 hours or £12,500 to comply with the request.

The Commissioner's view

27. The Commissioner accepts that a rate of two minutes to locate and assess each record in order to respond to the request is a reasonable estimate.
28. The Commissioner also accepts that as the request spans over 6 years and the sampling exercise demonstrated an average of 6 items being found and recorded in one day, the MoJ would have to review a large number of records in order to provide the complainant with all of the requested information.
29. The Commissioner notes that the MoJ's sample was small and it is not clear how typical the three day period it selected was likely to be (for example weekdays may be busier than weekends or vice versa). A larger sample might have indicated a lower daily average. However, the MoJ's estimate would need to be out by a factor of 20 for the request to have fallen within the cost limit. The Commissioner does not consider that that is realistic.
30. The Commissioner is satisfied that complying with this request would exceed the appropriate limit and that the MoJ was entitled to refuse the request under section 12(1).

Procedural matters

Section 16 – advice and assistance

31. Section 16 of FOIA requires public authorities to provide reasonable advice and assistance to those making, or wishing to make, information requests.
32. When a public authority refuses a request because the cost of compliance exceeds the appropriate limit, it should explain, to the

requester, how they could refine their request such that it would fall within that limit. In rare cases, it will be appropriate for the public authority to explain to the requester why their request cannot be meaningfully refined.

33. In this case, the MoJ informed the requester that they may wish to refine their request to the current year only. The MoJ stated that this may allow some of the requested information to be provided within the cost limit.
34. The Commissioner is therefore satisfied that the MoJ did comply with section 16 of FOIA when dealing with this request.

Right of appeal

35. 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-regulatorychamber

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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