

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2024

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

Decision (including any steps ordered)

1. The complainant requested financial and litigation friend information from the Official Solicitor and Public Trustee (the 'OSPT'). The OS and PT are two separate and distinct statutory office holders although at present the offices are held by one person; the complainant made his request to the OS. Ultimately, the OSPT, whose sponsoring department is the Ministry of Justice (the 'MOJ'), refused to answer any part of the request. For the parts of the request relating to the 'litigation friend', the OSPT advised that the OS (and PT) are not public authorities for the purposes of FOIA when acting as litigation friend and said that, subsequently, the work these offices undertake on their behalves does not fall within the scope of the FOIA. The OSPT also advised that part of the request relates to information it holds on behalf of the MOJ and was therefore caught by FOIA, but cited section 12(1) – the cost of compliance exclusion within FOIA to refuse it.
2. The Commissioner's decision is that the OSPT was entitled to rely on section 12(1) of FOIA for parts 1 to 3 of the request for the reasons set out in this notice. He also finds that the OSPT complied with its advice and assistance obligations for parts 1 to 3 in accordance with section 16 of FOIA.
3. The Commissioner has determined that the OSPT (specifically the OS in this case) was not obliged to respond to parts 4 to 6 of the request because it is not subject to FOIA .
4. No steps are required as a result of this notice.

Background

5. The MOJ responded to the Commissioner's investigation and has provided the following information as part of its submissions:

"Please note that OS and PT are two separate and distinct statutory office holders although at present the offices are held by one person.

[The complainant's] request relates to the OS only.

The OS & PT budgets are made up of MOJ funding and income. We do not produce or hold formal accounts, our figures feed into the MOJ's accounts. The OS & PT do provide income and expenditure returns to the MOJ. However, while the income is broken down into various work streams, the staff costs and other expenditure is not separated between OS, PT, and the two International teams. To do this would be a significant piece of work, especially as some staff work across the various business activities."

6. It is evident from the content of some of the documents available to the Commissioner that there has been previous correspondence between the complainant and the OSPT on the subject matter of his request dating back to 2022.
7. The Official Solicitor acts as a 'Litigation Friend' for adults who lack the mental capacity to make decisions for themselves, or on behalf of minors. A Litigation Friend makes the decisions about the court case on the client's behalf.

Request and response

8. On 8 January 2024, the complainant wrote to the OSPT and requested information in the following terms (numbers added for ease of reference):

"I would like information regarding the **Official Solicitor** [emphasis added].

1. Accounts from 2017 please include budgets and where funding has come from.
2. Staff numbers and ranks with wages, bonuses and other remuneration (names can be retracted).
3. Funding provided by government year by year.

4. Details of all cases where the OS acted as litigation friend and what bills were charged for these services over the last 7 years. Case by case with names retracted.
 5. Details of who appointed the OS as litigation friend. Was it appointed/requested by court or by family/applicant.
 6. Payments made by the OS to other parties including barristers and details of these parties including names."
9. The OSPT responded on 26 January 2024. It refused to respond to the request under FOIA and explained that:

"When the Official Solicitor acts as litigation friend, she is not a public authority for the purposes of FOIA and, subsequently the work this office undertakes on her behalf does not fall within the scope of the FOIA.

When the Public Trustee acts in the capacity as set out above, she is also not a public authority for the purposes of FOIA and, subsequently the work this office undertakes on her behalf does not fall within the scope of the FOIA."

10. The complainant requested an internal review on 29 January 2024. The OSPT issued a further response on 7 February 2024, but made no reference to this being an internal review outcome. The OSPT advised that its response to the FOIA request had been approved by the MOJ and told the complainant:

"As it is a repeated request and no changes have been made since our email to you dated 30 November 2022, when I confirmed that the Official Solicitor and Public Trustee are not subject to FOIA, and are not required to provide the information requested (this was in response to a request for a review of your initial FOI request dated 17 August 2022), no further action will be taken by the Official Solicitor."

11. In its submissions to the Commissioner, the MOJ has explained that:

"Acting as a litigation friend is a function of the Official Solicitor who is a statutory office holder. The appointment of the litigation friend is provided for in rules of court, in this particular case Court of Protection Rules.

If it assists, by way of further explanation, when the OS acts as litigation friend she is carrying out work on behalf of a private individual and discharging a role which can be discharged by any other person suitable and willing to act as litigation friend."

Scope of the case

12. The complainant contacted the Commissioner on 29 January 2024 to complain about the way his request for information had been handled. He said:

“I have asked the Official Solicitor to supply some basic information on the most vulnerable people in society they impose their services on and charge. They have refused to supply any information and say FOI does not apply to them.”
13. The complainant also argued that he considers the OS to be a public body under the umbrella of the MOJ and that it should be bound by FOIA, stating “it cannot decide which of its services are exempt from an FOI request”.
14. The MOJ responded to the Commissioner’s investigation on 20 June 2024 and submitted supporting documentation. On examining those documents, it became clear that an internal review had actually been carried out by the OSPT in this case and its outcome was conveyed to the complainant on 4 April 2024. This document was not submitted by the complainant as part of his complaint, nor did he raise any concerns about it having received the Commissioner’s scope letter of 4 June 2024.
15. The internal review outcome found that parts 1 to 3 of the request fall in scope of FOIA as the OSPT reports to “the wider MOJ finance department”. However, the OSPT said it was unable to respond to parts 1 to 3 on the grounds of cost citing section 12(1) of FOIA – the cost of compliance. The OSPT maintained that parts 4 to 6 of the request do not fall under the remit of FOIA for the reasons set out in the OSPT’s earlier responses.
16. On 1 July 2024, when the Commissioner first became aware of the existence of the internal review outcome, he wrote to the complainant. He asked the complainant to confirm whether he wished the Commissioner to also consider the OSPT’s reliance on section 12(1) of FOIA for part of the request. Although the onus is on the complainant to provide the requisite documentation and to raise any remaining FOIA concerns having received confirmation of the Commissioner’s intended investigation scope, the Commissioner exercised his discretion to allow the complainant the opportunity to definitively confirm his grounds of complaint.
17. Later on 1 July 2024, the complainant wrote to the Commissioner to confirm he would like the OSPT’s reliance on section 12(1) of FOIA to be part of the investigation.

18. The Commissioner has considered whether the whether the OSPT was entitled to rely on section 12(1) of FOIA for parts 1 to 3 of the request and whether it has complied with its section 16 of FOIA advice and assistance obligations. He has also determined whether or not OS is a public authority for the purposes of FOIA when acting as litigation friend and, consequently, whether the OS was obliged to respond to parts 4 to 6 of the request in accordance with FOIA.

Reasons for decision

Section 12 – Cost of compliance exceeds appropriate limit (Parts 1 to 3 of request)

19. The OSPT has explained on behalf of the MOJ that OS&PT hold some of the information requested by the complainant (ie parts 1 to 3 of the request) which falls within scope of FOIA. However, it said that to comply with the request as it stood would exceed the cost limit set out in FOIA.
20. The reasoning below examines whether the OSPT was entitled to rely on section 12(1) of FOIA to refuse to provide the requested information for parts 1 to 3 of the request.
21. Section 12(1) 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.
22. When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are:
- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
23. In accordance with the Regulations, the applicable cost limit in this case is £600, which is equivalent to 24 hours' work. This represents the estimated cost of one person spending 3.5 working days locating, retrieving, and extracting the information.

24. Section 12 of FOIA makes it clear that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the MOJ in its investigation response was reasonable; in other words whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, that section 12(1) therefore applied and that it was not obliged to comply with the request.
25. The Commissioner asked the MOJ to provide an estimate for the costs of complying with the request. It provided the following summary and accompanying rationale, in addition to the explanation set out in the 'Background' section of this notice):

"We believe that the cost of locating, retrieving, and extracting the information requested for the first three bullets would involve checking numerous spreadsheets for each month from 2017 which would exceed the appropriate limit. There is no central spreadsheet which holds all the information requested. Consequently, we were not obliged to comply with that request.

In providing the above response we took into consideration the factors listed below:

Staff Costs:

Calculating the staff costs for 7 years would require the review of 12 months' payroll report for each year. This would require locating, retrieving and extracting the OS's staff cost from the costs of the Public Trustee (PT) and of the two International teams (teams under Lord Chancellor's delegation) and apportioning the cost of the staff who work across the various business areas. This process would then need to be repeated to ascertain the average number of FTE at each grade for each year.

The estimate for this is 5 hrs x 7 years = 35 hrs work for a member of staff amounting to £1,250.

Reviewing the year-end figures for each of the 7 years to identify other expenditure:

Again, this would have to be apportioned between the OS, PT, and International Teams, to be in a position to answer the cost of the OS only. The estimate for this is 2 hrs work per year = 14 hrs work for a member of staff amounting to £500.

Extracting the OS funding from the annual OSPT funding from MOJ:

The estimate for this is 1 hr per year = 7 hrs for a member of staff amounting to £250.

Splitting the various lines of income between the OS & PT would not be too challenging as these are already identified as different income streams. However, identifying if the paying party is a vulnerable client, non-vulnerable individual or an NHS Trust, would require a lot more work.

The estimate is 3 hrs per year = 21 hrs, work for a member of staff bringing it to £750.

These estimates are based on previous exercises we have carried out to apportion income and expenditure. However, we have never had to do it to the level [the complainant] has requested, therefore we have applied an uplift to reflect this.

We can confirm that the estimate has been based upon the quickest method of gathering the requested information, ie, electronic databases searches rather than searching through manual files.”

26. The complainant did not submit any arguments as to why he believes section 12(1) of FOIA has been incorrectly applied to parts 1 to 3 of his request.
27. Having considered the rationale provided, the Commissioner finds that this is entirely reasonable. The Commissioner further notes that, the total time significantly exceeds the cost limit of 24 hours and £600 proscribed by FOIA.

Conclusion

28. In determining whether the OSPT has correctly applied section 12 of FOIA in this case, the Commissioner has considered the MOJ's rationale provided to him during the investigation.
29. The Commissioner accepts that the OSPT has reasonably estimated that the cost of complying with parts 1 to 3 of the request would exceed the appropriate limit. It follows that the Commissioner finds that section 12(1) has been correctly applied to parts 1 to 3 of the request under consideration.

Section 16 – advice and assistance (Parts 1 to 3 of request)

30. Section 16 of FOIA requires public authorities to provide reasonable advice and assistance to those making or wishing to make requests for information.
31. The Section 45 FOIA Code of Practice (the 'Code')¹ states that, where a public authority is relying on section 12 to refuse a request, it should help the requester to refine their request within the cost limit.
32. In its internal review outcome of 4 April 2024, the OSPT advised the following:

“Although we cannot answer your request at the moment, we may be able to answer a refined request within the cost limit. You may wish to consider, for example, the total number of staff at 31 March for the financial years 2017/18 to 2023/24, and for the same period the annual total cost of staff, other expenditure, income and departmental funding. Please be aware that we cannot guarantee at this stage that a refined request will fall within the FOIA cost limit, or that other exemptions will not apply.”

33. In addition, the OSPT provided the complainant with URL to the ICO's guidance on how to structure successful requests.²
34. Having considered the available evidence, the Commissioner is satisfied that the OSPT offered reasonable advice and assistance. He therefore finds that it complied with its section 16 of FOIA obligations.

OS – is it caught by FOIA? (Parts 4 to 6 of request)

35. Parts 4 to 6 of the request relate to the OS in her capacity as litigation friend. The 'Background' section of this notice sets out further details about this.
36. In its responses the OSPT (and specifically the OS given the request was addressed to the OS) has said that parts 4 to 6 of the request relate to the OS' function as a litigation friend which it has argued does not fall under the FOIA.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

² <https://ico.org.uk/for-the-public/your-data-matters/official-information/>

37. FOIA gives members of the public the right to access recorded information held by public authorities and places a duty on public authorities to respond to requests for such information.
38. The definition of 'public authority' is given in section 3(1) of FOIA. In particular it states that under FOIA a 'public authority' means:
- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which-
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
 - (b) a publicly-owned company as defined by section 6.
39. Section 5 allows the Secretary of State to designate a public authority by order.
40. Section 6 states that a company is a 'publicly-owned company' for the purposes of section 3(1)(b) if it is wholly owned by the Crown or is wholly owned by any public body listed in Schedule 1 of FOIA (other than a government department or any authority which is listed only in relation to particular information).
41. In its submissions to the Commissioner the MOJ said:

"In respect of FOIA please refer to section 3 and schedule 1 to the Act – you will note there are no references to the OS or PT, and we have not been notified of any changes. If the OS and PT were named, we would expect it to be in schedule 1, Part VI (Other Public Bodies and Offices: General) as we are not a government department (Part I).

This is section 3:

<https://www.legislation.gov.uk/ukpga/2000/36/section/3>

This is schedule 1:

<https://www.legislation.gov.uk/ukpga/2000/36/schedule/1>

There are two international teams based in the OS and PT's office whose work is under the Lord Chancellor's delegation - REMO (Reciprocal Enforcement of Maintenance Orders) and ICACU (International Child Abduction and Contact Unit). They carry out work for the Lord Chancellor. These teams are subject to FOIA (on behalf of the MOJ), and OSPT respond to FOI requests related to the work of those two teams only.

Despite not being the subject of the FOIA, we have made an exceptional effort to assist [the complainant] with his request as

we believe the request relates to ... regarding the case in which the OS was appointed to act as litigation friend...[the complainant] was a party in those proceedings”.

42. The OSPT is not covered by any of the above definitions of 'public authority' and therefore is not subject to FOIA.
43. It is not in dispute that the MOJ is a public authority for the purposes of FOIA. However, the Commissioner considers that FOIA only applies to the information held by public authorities for their public authority functions. For this reason, the information requested by the complainant at parts 4 to 6 that may be held by the OSPT is not within the scope of FOIA.
44. The Commissioner accepts the notion that, although the OSPT may physically hold information of the nature requested at parts 4 to 6, it does not hold this information for the purposes of FOIA, is a difficult concept. However, in this case, he is satisfied that the OSPT does not physically hold the information requested at parts 4 to 6 of the complainant's request on behalf of the MOJ and that this information is therefore not held for the purposes of FOIA.

Other matters

45. The Commissioner would remind the complainant to ensure that all the requisite request documentation is provided to him with the complaint, so that he can readily assess the nature and scope of his investigation.
46. The Commissioner understands from the MOJ's investigation response that the complainant has subsequently made further requests to the OSPT where he has elected not to refine his requests as advised. The Commissioner would suggest that the complainant considers refining any future requests in order to stand a better chance of receiving the requested information falling within the section 12 cost limit.

Right of appeal

47. 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

48. 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.
49. 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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