

Freedom of Information Act 2000 (Section 50)

Decision Notice

18 December 2008

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

Summary

The complainant made two requests for information to the Ministry of Justice (MoJ). The first request was refused under section 12 of the Act as the MoJ stated that to locate the information held would exceed the appropriate cost limit. The MoJ informed the complainant that the information requested in the second request was not held. The Commissioner has investigated and finds that section 12(1) is engaged as he agrees that to provide the information in the first request would exceed the appropriate cost limit. He also finds that the information requested in the second part of the second request is not held. However the Commissioner also finds that the MoJ breached the requirements of sections 1(1) (a), 1(1) (b) and 10(1) of the Act.

The Commissioner's Role

1. 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 the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following request for information to Lord Falconer on 18 April 2007:

"please provide me with copies of all correspondence or any other form of communication between you personally or the Department of Constitutional Affairs (and its predecessor linked to the Lord Chancellor) and the FSA, within the last 6 years.

In addition please provide me with copies of all correspondence or any other form of communication between you personally or the Department of Constitutional Affairs and the ICO, the Information Tribunal, the OJC and the Judicial Ombudsman relating to the FSA, the FSMA or my particular case.”

3. The Ministry of Justice (MoJ) responded on 21 May 2007 explaining that the request was being handled by the newly formed MoJ which the Department of Constitutional Affairs (DCA) became part of on 9 May 2007. The MoJ stated that to locate, retrieve and extract the data requested from all areas of the department would take in excess of three and a half days and therefore exceed the cost limit under section 12 of the Act. The MoJ explained that this was due to the size of the department, the different areas of work and the fact that there is no centralised computer system which details all persons or organisations within the department. The MoJ invited the complainant to refine his request explaining that he may wish to narrow it by limiting the information to a specific topic, time frame or document.
4. The complainant responded on 26 May 2007 asking the MoJ to itemise the information that he has asked for and provide him with an estimate to obtain each element.
5. MoJ responded on 22 June 2007 explaining to the complainant that the information he requested is not held centrally and to produce an itemised breakdown as requested would in itself exceed the cost limit of three and a half working days. MoJ stated that this was because it would have to contact all the various sections within the department to establish what information is held.
6. On 4 July 2007 in response to the above letter the complainant wrote to the MoJ to request the following information:

“please provide me with a list of any person, group or department who you deem could qualify as part of the group that you would consider relevant to respond to my request and initially provide me with copies of all documents originating directly from Lord Falconer or his personal aid / secretary / assistant on the subject of the myself, the Tribunal that I originated or the FSMA in the last 7 years.”

The Investigation

Scope of the case

8. On 22 August 2007 the complainant contacted the Commissioner to complain about the way his two requests for information had been handled. The complainant specifically asked the Commissioner to obtain for him a positive response from the MoJ.

9. The complainant agreed in a telephone conversation on 19 September 2007 that he was not seeking an investigation into the handling of any aspect of his request relating to his personal data i.e. the references within the information requests of 18 April 2007 and 4 July 2007 to himself, his Tribunal or his case.
10. The Commissioner also explained to the complainant in a letter dated 19 September 2007 that he would not be investigating the element of his 4 July 2007 request starting *"who would deem would qualify..."* as this was being treated by the MoJ as a request for an opinion and treated as 'normal course of business' rather than an FOI request..
11. However, during the course of the investigation the Commissioner reconsidered this position regarding the request of 4 July 2007 for *"please provide me with a list of any person, group or department who you deem could qualify as part of the group that you would consider relevant to respond to my request"* and found that this was a valid request under the Act (see further analysis at paragraph 27).
12. The Commissioner's investigation has therefore focused on the MoJ's handling of the information requests of 18 April 2007 and 4 July 2007 excluding any elements relating to the complainant's personal data. The Commissioner has also not investigated the handling of the complainant's information request dated 5 April 2008.

Chronology

13. On 19 September 2007 the complainant contacted the Commissioner to request an update on the progress of his case. During this telephone call he explained that he had still not received a response to his request of 4 July 2007. It was agreed that the Commissioner would contact the MoJ regarding the non response to the 4 July 2007 request asking them to respond within 20 working days and if following this there was no response the complaint regarding both request (18 April 2008 and 4 July 2007) would be passed to the relevant team to investigate. The complainant also agreed that he would exclude any matters relating to his personal data from this complaint. Following the telephone conversation the Commissioner wrote to the complainant outlining the content of the telephone conversations.
14. The complainant responded on 23 September 2007 explaining that as a result of the above telephone conversation and letter he had now sent two new requests for information to the MoJ. The complainant wrote again on 7 November 2007 stating that he had sent another two letters to the MoJ to try and *"prize out of them sufficient information so that I could proceed with a better definition of my originally request. Neither has been answered."*
15. The Commissioner wrote to the complainant on 3 January 2008 asking the complainant if he had submitted a refined request in response to the MoJ's letter of 21 May 2007.

16. In response to this the complainant provided the Commissioner with a copy of his letter sent to the MoJ dated 26 May 2007 in which he requested an itemised breakdown of this request.
17. The Commissioner wrote again to the complainant on 13 February 2008 outlining his understanding of the current position and history of the complaint. The Commissioner also wrote to the MoJ on the same date. The Commissioner explained that he understood the letter of 4 July 2007 to be in part, a refinement of the original request of 18 April 2007 and that he could not find any record of a response from the MoJ to this request. The Commissioner explained that he understood the MoJ had treated this aspect of the correspondence to be a request for an opinion rather than a refined request however in the Commissioner's view this request when taken in the context of the proceeding correspondence could be seen as a refinement of the original request. The Commissioner asked the MoJ to confirm if it had responded to this letter and if so provide him with a copy, if a response had not been sent the Commissioner asked the MoJ to now do so.
18. The MoJ responded to the Commissioner on 3 April 2008 explaining that it had now responded to the complainant in relation to the 4 July 2007 request confirming that it does not hold the information requested. However the MoJ explained that it had considered what other data it held that might be relevant, it stated that Officials attended the Tribunal on behalf of the department. This led to an exchange of emails and in an attempt to be helpful it had released the details of these emails to the complainant.
19. The MoJ wrote to the complainant on the same date. The letter explained that no information was held in relation to his refined request of 4 July 2007. However the letter went onto explain that the MoJ does hold a small amount of information relating to his Tribunal case. Aside from the information he already had access to; the MoJ stated that some of this would be exempt under the Act. The MoJ explained that the remaining information held was an exchange of emails between officials and attached a copy to the complainant in an attempt to assist him in refining his request. The MoJ stated that although this information did not fall within the scope of the refined request, it was being sent in an attempt to be helpful.
20. The complainant responded on 5 April 2008 asking the MoJ a number of questions and requesting a review of their response dated 3 April 2008. Included in the letter was a new request for information:

“all other communications in full, including notes of telephone conversations, relating to me and / or the Tribunal that I attended”
21. The Commissioner wrote to the complainant on 8 April 2008. The Commissioner explained that the complainant's request (that dated 18 April 2007) had been refused under section 12 of the Act resulting in his later refined request of 4 July 2007. The Commissioner explained that this request had now been responded to and the MoJ had confirmed that it did not hold the information requested in this

refined request. In light of this the Commissioner asked the complainant to confirm if he still wished to pursue his complaint.

22. The complainant responded on 6 May 2008 explaining that he still wished to proceed with his complaint in relation to the information request of 18 April 2007 and 4 July 2007, he also pointed out that the MoJ had not responded to his new information request contained in the letter of 5 April 2008.
23. The Commissioner wrote to the MoJ on 3 June 2008, in relation to the request of 18 April 2007 the Commissioner asked for further explanation and a breakdown as to how the estimated cost of compliance with this request would exceed the appropriate cost limit. In relation to the refined request of 4 July 2007 the Commissioner asked the MoJ to clarify what searches had been completed to establish that this information was not held. The Commissioner also provided the MoJ with details of the complainant's letter dated 5 April 2008 pointing out the new request for information contained within it and asking that the MoJ now respond.
24. The MoJ responded on 15 August 2008 to the Commissioner. The MoJ explained in more detail why to supply the information requested would exceed the appropriate cost limit and why the information requested on 4 July 2007 is not held. In relation to the new request for information dated 5 April 2008 the MoJ explained that it had not previously received this letter but that it would be assessing the information held for release to the complainant and would aim to respond within 20 working days.

Findings of fact

25. The complainant's request stems from his Information Tribunal hearing EA/2005/0019 v the Information Commissioner and the FSA (Financial Services Authority) regarding the application of the FSMA (Financial Services and Markets Act) to information he had requested from the FSA.

Analysis

Section 1 'General Right of Access'

26. Section 1(1) (a) provides that:

Any person making a request for information to a public authority is entitled to be informed in writing if the information is held and (b) if that is the case to have that information communicated to him.

Section 10(1) provides that:

A public authority must comply with section 1(1) no later than the twentieth working day following the receipt.

27. The first part of the complainant's request on 4 July 2007 asked for "a list of any person, group or department who you deem would qualify as part of the group that you would consider relevant to respond to my request". The MoJ confirmed to the Commissioner that this was not being treated as a valid request for information as they did not view it as a request for a copy of recorded information.
28. The Commissioner considers that the 4 July request is a valid request under the Act as any written question put to a public authority is technically a request under the Act. Although the request is a question it is possible that there is recorded information falling within the scope of the request. In the Tribunal case *Fowler and Brighton and Hove City Council* one of the complainant's many questions regarding wheelie-bins and the Council's policies on recycling was:

"(q) I asked the Council to provide from its records details of why it considered that the system of working that it had introduced was more efficient, when that system of working appeared to be less efficient."

The Tribunal, using the question as an example said:

"...it is always possible that the Council may hold recorded information which answers that question: there may have been a report prepared for the Council setting out the pros and cons of different proposals, reaching a reasoned conclusion."

29. For part one of the 4 July request the Commissioner therefore finds a breach of section 1(1)(a) of the Act as the public authority failed to confirm or deny whether it held information falling within the scope of the request within twenty working days of receiving the request. The Commissioner also finds the public authority in breach of section 1(1)(b) of the Act as it has failed to either provide the requested information or a valid refusal notice within the statutory time limits. The MoJ also breached 10(1) for failing to deal with this part of request within the statutory time frame required.
30. The second part of the complainant's refined request dated 4 July 2007 was for:
- "copies of all documents originating from Lord Falconer or his personal aid / secretary / assistant on the subject of myself, the Tribunal that I originated or the FSMA, in the last 7 years."*

The Commissioner, as noted in paragraph 9, is only considering the MoJ's handling of the element not relating to the complainant's personal data which limits the investigation to information on the FSMA.

31. The MoJ responded on 3 April 2008 explained that there is no document originating directly from the former Lord Chancellor, Lord Falconer or the staff of his private office relating to him or his tribunal case. MoJ did confirm that it held some information relating to his Tribunal and disclosed an exchange of internal emails between officials who attend the hearing. MoJ explained that whilst this information did not fall within the scope of his refined request it was being

supplied as it felt the information would be of interest to him and could assist the complainant in crafting a legitimate response.

32. The complainant in his request for a review of this decision states that he did not limit the above request to the Lord Chancellor (Lord Falconer) or his personal staff. However, the Commissioner notes that the refined request of 4 July 2007 is indeed limited to Lord Falconer and his staff.
33. The MoJ have explained to the Commissioner that it searched for information generated by the Lord Chancellor and his office and found that none was held however, during the course of its searches it did locate some information relating to the FSA and the complainant's Tribunal. It informed the complainant of this to help him in making a further information request (which the complainant did on 5 April 2008) and supplied some information which it though might be of interest to the complainant.
34. The Commissioner has considered whether or not he is satisfied that the MoJ does not hold the information requested in the second part of the 4 July 2007 request. The MoJ explained to the Commissioner that it is the role of the department to support the Lord Chancellor and Secretary of State for justice and other departmental ministers. Monitoring and attending Tribunals is a responsibility that minister delegate to officials and to this end neither the lord Chancellor and Secretary of State, the staff of his Private Office or his special advisors would get involved in individual Tribunal Cases. Further the Lord Chancellor does not have responsibility for the FSMA or the FSA and it is unlikely that either he or his staff would have had any communications directly or otherwise on these subjects.
35. The Commissioner is therefore satisfied that the MoJ does not hold this information but that the MoJ did not comply with the requirements of section 1(1) (a) in relation to the second part of the request of 4 July 2007 as it did not inform the complainant that the information was not held until the complaint was before the Commissioner. The MoJ also breached section 10(1) as the response was issued outside of the twenty working days allowed. In the case of *King v Information Commissioner & the Department for Work and Pensions* the Tribunal found that the latest date as to when a decision should be made regarding section 1 is the date upon which the valid complaint is made to the Commissioner. The Commissioner's view is that this does not preclude finding a section 1 breach at a date between that of the internal review and that upon which a valid complaint is accepted by the Commissioner.
36. In response to the 4 July 2007 request the MoJ found some information which it disclosed to the complainant. The MoJ explained that Officials attended the Tribunal originated by the complainant on behalf of the department. This led to an exchange of emails which the MoJ came across independently of its searches for the information requested on 4 July 2007. It disclosed to the complainant this chain of emails in an attempt to assist him in refining his request. Having viewed the chain of emails the Commissioner takes the view that this information falls within the scope of the complainant's first request of 18 April 2007 as it is

correspondence between the DCA (MoJ) relating to the FSMA and the Tribunal referred to in the request. The MoJ explained to the Commissioner that the information was been located by chance in the inbox of a member of staff and was not found during the course of any searches in relation to information requested by the complainant.

37. The Commissioner finds that although this is information fell within the scope of the complainant's request dated 18 April 2007 the MoJ was not under an obligation to disclose this information as it had correctly relied upon section 12 (see analysis below).

Procedural matters: Section 12 'Cost Limit'

38. Section 12(1) of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit. The Appropriate Limit and Fees Regulations 2004 set a limit of £600 to the cost of complying with a request for central government departments listed in Schedule 1 part I of the Act. The cost is calculated at a rate of £25 per person per hour, which therefore translates to 24 hours of staff time. In estimating the cost of complying a public authority can take the following into account:

- determining whether it holds the information requested,
- locating the information or documents containing the information,
- retrieving such information or documents, and
- extracting the information from the document containing it.

39. The complainant's request of the 18 April 2007 has been refused by MoJ under section 12. The request can be split into two parts:

1. All correspondence or any other form of communication between Lord Falconer or the DCA and the FSA within the last six years
2. Copies of all correspondence or any other form of communication between Lord Falconer or the DCA and the ICO, the Information Tribunal, the OJC and Judicial Ombudsman relating to the FSA, the FSMA or my case.

As the complainant has agreed that he is excluding any matters relating to his personal data from this complaint the Commissioner has not investigated the handling of the element of part 2 of the request which refers to the complainant's case.

40. The MoJ confirmed that it held information falling within the scope of the above requests but explained that the requests are extremely wide ranging, effectively asking for any information the department holds that amounts to correspondence with the FSA. The MoJ is a very large and diverse organisation and the point at which it might contact the FSA varies from issues surrounding the regulation of claims managers to its own budgetary measures. To ensure it had identified all

documents held would involve searching the files and electronic records of many parts of the department without knowing what it was looking for.

41. The MoJ explained that as no timescale was specified it was not certain at what point since the FSA's inception information of interest to the complainant might be held. MoJ stated that it is obvious that to undertake the search for every document would clearly exceed the cost limit and to identify and list all such documents would, in itself, exceed the cost limit.
42. The Commissioner notes that the first part of the request did specify a time limit as it requested communications between Lord Falconer, or the DCA and the FSA within the last six years. The second part of the request is more specific, asking for communications between the ICO, the Information Tribunal, the OJC and the Judicial Ombudsman relating to the FSA, the FSMA or the complainant's case; however no time frame is specified.
43. The MoJ have explained that it has identified that there are several areas within it which are most likely to have communicated with the FSA including the Court Services as they would provide the FSA with details of repossessions, mortgages defaults or a range of other cases involving financial or commercial matters. Information falling within the scope of the request could also be held within various sections within the Court Service HQ or at the Bulk Issue Centre at Northampton who deal with a large number of default and repossession cases. The MoJ also stated that there are several sections within the MoJ who would also have corresponded with the FSA such as the Press Office, the Access to Justice Division, the Economic & Statistical Division and the Legal Services Branch. These departments' files are unlikely to be filed with reference to the FSA or FSMA but for examples, the Court Service files will be filed with reference to case number rather than subject.
44. The MoJ stated that there is also likely to be information in the Ministerial Private Offices who may have corresponded with the FSA about the FSMA or other issues. The MoJ have also pointed out that information may also be found in the Tribunal Services who will have dealt with the FSA on the FSMA. In addition with specific reference to the second part of the request the information held could also be located in its Data Access Unit as well as all of the sources listed above. MoJ stated that these are examples of a small number of departments it would need to search.
45. Even based on this small number of departments within the MoJ it would need to ask all of these sections to look through paper files, e-mails and records filed within the departmental electronic records management system, Excel spreadsheets and other databases. MoJ assert that to assess who might hold the information, without extracting the information would involve several people taking up many hours and would exceed the three and half days £600 cost limit. MoJ explained that this estimate is based on the assumption that it would take one person ten minutes to go through each paper file held within each department and assess if any information held relates to the FSA or the FSMA, based on this it would only be able to search through 144 files before reaching the costs limit. MoJ explained that due to the volume of departments it would have to search,

that even based on the limited departments cited here as an examples it would clearly exceed the cost limit.

46. The Commissioner considers that based on the broad scope of the requests that the MoJ's estimate is reasonable. He considers that as the request ask for all contacts with the FSA within the last six years that it is reasonable for the MoJ to assert that there are multiple business areas within which it would need to undertake searches. These areas range from Court Services to the Tribunals Service who's electronic and paper files would need to be interrogated. Although the second request appears more focused as it asks for contacts the MoJ has had with other departments on the FSA or the FSMA he accepts that similar searches would need to be undertaken as these contacts could also have occurred within more than one business area of the MoJ.
47. On the basis of the above, the Commissioner accepts that section 12(1) applies as to comply with the request of 18 April 2007 would exceed the cost limit of £600.

Section 16 'Duty to provide advice and assistance'

48. Section 16(1) provides that:

'it shall by the duty of a public authority to provide advice and assistance, so far as it would be reasonable to do so, to persons who propose to make, or have made, request for information to it'.

Section 16(2) provides that:

'any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case'.

In cases were a public authority is relying on section 12(1) the section 45 code of practice on the discharge of public authorities' functions under Act states that:

Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.

49. The Commissioner notes that the MoJ provided the following advice and assistance to the complainant in its letter of 21 May 2007 in an attempt to help him to refine his request and bring it within the cost limit:

"In order to refine your request in such as way as to bring it under the cost limit, you may wish to narrow it by for example, limiting the information to a

specific topic, an exact time frame or if there is a specific document you are interested in. If it relates to your specific case that you mention in your request can you please let me have the details of which parts of the department you have been in contact with.”

50. This advice and assistance resulted in the complainant making a refined request for information on 4 July 2007. The Commissioner accepts that the MoJ provided advice and assistance in accordance with the requirements of section 16(1). However, as discussed in the other matters section this advice, as a matter of good practice, could have gone further in assisting the complainant in refining his request.

The Decision

51. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- (i) Applied section 12(1) of the Act correctly to the information request of 18 April 2007
- (i) Complied with the requirements of section 16(1)

52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- (i) Breached the requirements of section 10(1) by failing to respond to the request of 4 July 2007 within twenty working days.
- (iii) Breached the requirements of section 1(1) (a) and (b) in relation to the request of 4 July 2007.

Steps Required

53. The Commissioner requires that the MoJ take the following steps:

- (i) Respond to the first part of the information request of 4 July 2007 for: “a list of any person, group or department who you deem could qualify as part of the group that you would consider relevant to respond to my request”

54. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

55. The Commissioner notes that the complainant requested on 26 May 2007 a breakdown as to how the MoJ had estimated that to provide the information requested would exceed the appropriate limit.
54. The Commissioner notes that there is no statutory requirement for a public authority to provide a breakdown as to how they have reached their estimate but as a matter of good practice they should, if only to try to avoid cases being passed to the ICO and thereafter to avoid decisions or enforcement notices or practice recommendations being issued against them. The Tribunal offered support for this approach in the case of *Gowers and the London Borough of Camden (EA/2007/00114)* in which it was said that a public authority should demonstrate how their estimate has been calculated:

“...a public authority seeking to rely on section 12 should include in its refusal notice, its estimate of the cost of compliance and how that figure has been arrived at, so that at the very least, the applicant can consider how he might be able to refine or limit his request so as to come within the costs limit...” (para 68).

55. Whilst the MoJ have explained why providing the information sought would exceed the cost limit, it has not provided a breakdown which could have further assisted him in refining his request. This may have enabled the complaint to make a more successful request than that of the 4 July 2007 which the MoJ ultimately found was not held.

Right of Appeal

56. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: .

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 18th day of December 2008

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**