

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2012

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

Decision (including any steps ordered)

1. The complainant requested information related to rent review negotiations regarding a specific property (Tay House, Glasgow) occupied by the public authority and also for all properties occupied and/or operated by public authority.
2. The Commissioner's decision is that:
 - The public authority held information (five emails) within the scope of the request in relation to Tay House, Glasgow. However, on a balance of probabilities, it did not hold additional information in respect of this request.
 - In relation to the wider request in connection with all properties occupied and/or operated by the public authority, the public authority was entitled to rely on section 12(2) to the extent that it could not determine if it held all of the information within the scope of the request. It was additionally entitled to rely on section 12(1) to the extent that it could confirm it held some information (i.e. in relation to the Prison Estate) but could not provide the information because it would exceed the appropriate limit to do so.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose copies of the five emails from 2005 related to the Tay House rent review of 2005 subject to the application of other provisions in FOIA including exemptions.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 August 2011, the complainant wrote to the public authority¹ and requested information in the following terms:

'.....please provide me with full details of any and all arrangements, authorities, approvals, regulations related to or concerning the negotiation and agreement of reviewed rentals with respect to the Property [Tay House, Glasgow] in particular and properties occupied and/or operated by or under the authority of the Secretary of State for Justice both as at 28 November 2008 and the date of this email.

If there are named persons or persons holding specified positions who had or have the relevant authorities, then details of the individual persons or positions should be disclosed with copies of all relevant documentation relating to those authorisations.'

6. The public authority responded on 19 December 2011 and appeared to only address the first part of the request in relation to Tay House. In its own words:

'I can confirm that the MOJ holds the information requested and I am pleased to provide this to you. Tay House is held in the name of the Secretary of State for Communities and Local Government. When responsibility transferred for the property from the Home Office (HO) to the MOJ there was no need for the property to transfer 'formally' as the MOJ uses the same powers as the HO for office properties.

¹ The 'Ministry of Justice (MOJ)' and 'public authority' are used interchangeably throughout the notice.

Although ownership of Tay House is held in the name of the Secretary of State for Communities and Local Government, administrative ownership, including day-to-day management, is held by the department with responsibility for the 'service' conducted from the premises. On 28 November 2000 this was the HO and on 19 August 2011 this was the HO on behalf of MoJ. Rent review negotiations would normally be undertaken by the department with such functional responsibility and/or its appointed professional advisors. I hope this information is helpful – I can confirm we do not hold any additional recorded information within the scope of your request.'

7. The complainant requested an internal review on 9 January 2012. His grounds for requesting a review are summarised below.
8. He submitted that the public authority's letter of 19 December did not properly set out the terms of the request. The full terms of the request extended both to the provision of full details and the provision of copy documentation. The letter also incorrectly referred to 28 November 2000 and 19 August 2011 when the relevant dates were actually 28 November 2008 and 19 August 2011.
9. The complainant reiterated that the request was for full details including documentation in relation to arrangements, authorities, approvals, regulations regarding the negotiation and agreement of reviewed rentals both with respect to Tay House in particular and all other properties occupied and/or operated by the public authority. He did not consider that '*the request [had] been handled properly or that the request [had] been answered either correctly or adequately*'.
10. He submitted that the department with functional responsibility for the service conducted from Tay House, both as at 28 November 2008 and 19 August 2011 was and is the public authority because it was responsible for the operation of the Criminal Injuries Compensation Authority (CICA) which is housed at Tay House during the relevant period. Also, officials at the Home Office had informed him that the Home Office did not hold the information requested. Therefore, the information requested exists and is held by the public authority, the Department responsible for the service conducted from Tay House. The same reasoning also applies to other properties occupied and/or operated by or under the authority of the Secretary of State for Justice (i.e. the second part of the request).
11. Following the completion of the internal review, the public authority wrote back to the complainant on 29 February 2012. It accepted that it had not properly set out the terms of the request and that the relevant dates quoted were incorrect. However, it explained that the original response had complied with the first part of the request in relation to Tay House and that responsibility for rent reviews (in respect of Tay

House) on 28 November 2008 up to the point of conducting the internal review (i.e. including 19 August 2011) was with the Home Office.

12. In terms of the wider request in relation to other properties (i.e. the second part of the request), the public authority offered the following explanation:

'Most departments across the civil estate do not hold any authority of this type in their own right. Therefore, office properties occupied by the MoJ are held in the name of the Secretary of State for Communities and Local Government with administrative ownership, including day-to-day management, being the responsibility of the MoJ Estate Directorate.

The exception of this is that property forming part of the prison estate are held in the name of Secretary of State of Justice. However, it would exceed the cost limit contained with FOIA to establish if we hold the details of these properties.

The law allows us to decline to answer requests under FOIA when it is estimated that it would cost more than £600 to confirm that the department holds the information requested. You may be interested to know that the limit is equivalent to 3½ working days' worth of work, calculated at £25 per hour.

In order to provide the information you ask for we would need to collect these details for each property that comprises the prison estate (including prison quarters as well as custodial premises) There is no central record of this information and it is therefore my belief that obtaining these details would take more than 3½ days....'

13. Therefore, the public authority's position at the time of the internal review was that it did not hold any additional information in relation to the request regarding Tay House and it would appear that it was of the view that it could not comply with the wider request in relation to other properties on the basis of section 12(2) FOIA.²

Scope of the case

14. On 20 April 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. However, it was not accepted for investigation until 13 June 2012 after
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² By virtue of section 12(2), a public authority is exempt from its obligation to confirm or deny whether it holds information if to do so would exceed the appropriate limit.

the complainant had provided all the documents required to process the complaint.

15. He provided the Commissioner with a copy of an email of 21 October 2011 from the Home Office in which he was advised, contrary to what he had been informed by the public authority, that the Home Office did not hold information relevant to his request and that the request would be handled by the public authority.
16. He therefore questioned the accuracy of the public authority's statement in its letter of 29 February 2012 in which it claimed that responsibility for rent reviews in respect of Tay House was a matter for the Home Office on 28 November 2011 and remained as such on 29 February 2012.
17. He pointed out that neither the Home Office nor the public authority had provided him with any documentation specifically showing which Department had authorisation to deal with rent reviews in respect of Tay House. More pertinently, he had not been provided with any documentation relevant to his request.
18. In a telephone conversation with the Commissioner's representative on 8 August 2012, the complainant confirmed that his complaint was in relation to the first and second parts of his request.
19. On 10 August 2012 the Commissioner wrote to the public authority. He requested a full and detailed explanation in support of the position that it did not hold any additional recorded information in relation to the request in respect of Tay House. He also requested its submissions in support of the application of section 12(2).
20. The public authority wrote back on 7 September 2012. Following further exchanges with the Commissioner, the public authority confirmed it had revised its position that it did not hold additional recorded information in respect of Tay House and that it could not comply with the wider request on the basis of section 12(2).
21. The public authority now confirmed it held information within the scope of the '*broad request*'. It explained that this revised position meant that it considered the first part of the request (i.e. in respect of Tay House) and the second part of the request (i.e. the wider request) as a single broad request. However, it claimed that to comply with the broad request would exceed the appropriate limit and section 12(1) therefore applied. The public authority then went on to state:

'.....the Ministry of Justice is one of the government's largest departments, occupying around 1,700 properties.....However there is no central record of lease and rental arrangements across the MoJ estate.....we would anticipate all of the civil estate is held in the name

of the Secretary of State for Communities and Local Government. But we cannot rule [out] the possibility, given that much of our estate has been inherited from other government departments over a considerable period of time that a property might be vested in the name of someone else. We could only confirm that by looking at each and every agreement.'

22. The public authority explained that the Prison Estate (part of the 1,700 properties) is vested in the Secretary of State for Justice and confirmed that it held information relating to the Prison Estate which fell within the scope of the request. It however claimed that it would exceed the appropriate limit to provide the relevant information.
23. The public authority also informed the Commissioner in the same letter that it had undertaken further searches of its electronic management system and discovered some email exchanges within the scope of the request in relation to Tay House.
24. It seemed therefore that the public authority was relying on section 12(1) in respect of the '*broad request*' because it could confirm it held information in relation to request regarding Tay House and for the Prison Estate which was part of the wider request for properties in its estate.
25. Following a number of further queries to the public authority, the Commissioner decided to exercise his discretion to reject the late introduction of section 12(1) to the request in relation to Tay House. The Commissioner however accepted for the purposes of his investigation the reliance on section 12(1) in relation to the wider request for properties occupied and/or operated by the public authority. In other words, the Commissioner rejected the public authority's decision to re-interpret the request to suit its objective of introducing section 12(1) to cover both parts of the request. He exercised his discretion in this manner because he did not consider that accepting the late reliance of section 12(1) to the request in relation to Tay House would be fair to the complainant in the circumstances. At the time of the request, the complainant understood from the public authority's responses that they were two separate issues in relation to the first and second parts of his request.
26. The singular issue regarding his request in relation to Tay House was whether the public authority held additional recorded information. Therefore, accepting the public authority's late introduction of section 12(1) to the broad request would have effectively denied the complainant the opportunity he should have had at the time of his request to consider narrowing it in order not to fall foul of the provisions

of section 12.³ Given that the public authority had the opportunity to properly consider its position when it issued its initial response to the request and at the time of the internal review, the Commissioner believes that to allow the public authority to fundamentally change its position so late on would have been unfair to the complainant. He also believes that the steps already taken by the public authority to comply with the request in relation to Tay House meant that it was simply not reasonable in the circumstances to subsequently rely on section 12(1) to deny the request. The Commissioner is satisfied that accepting the late introduction of section 12(1) in the circumstances would not make a major difference to the position in relation to the cost of complying with the wider request for other properties occupied by the public authority.

27. In view of the above, the scope of the investigation was to determine:

- Whether the public authority held additional recorded information within the scope of the request for: *'full details of any and all arrangements, authorities, approvals, regulations related to or concerning the negotiation and agreement of reviewed rentals with respect to [Tay House, Glasgow]..... both as at 28 November 2008 and the date of this email.....If there are named persons or persons holding specified positions who had or have the relevant authorities, then details of the individual persons or positions should be disclosed with copies of all relevant documentation relating to those authorisations.'* [Part 1]
- Whether the public authority was entitled to rely on section 12(1) to refuse to comply with the request for: *'full details of any and all arrangements, authorities, approvals, regulations related to or concerning the negotiation and agreement of reviewed rentals with respect to properties occupied and/or operated by or under the authority of the Secretary of State for Justice both as at 28 November 2008 and the date of this email. If there are named persons or persons holding specified positions who had or have the relevant authorities, then details of the individual persons or positions should be disclosed with copies of all relevant documentation relating to those authorisations.'* [Part 2]

³ In addition, by virtue of section 16 FOIA, the public authority would be expected to provide advice and assistance to the complainant to enable him narrow his request accordingly.

Reasons for decision

Section 1 FOIA – Part 1

28. Section 1(1) states:

'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.'

29. Section 1(2) states:

'Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'

30. Section 1 therefore grants individuals a presumptive right of access to information under FOIA so that, subject to other provisions of FOIA including exemptions, a public authority is under a duty to inform the person making the request in writing whether it holds the information and if it does, to provide it to that person.

31. In determining whether a public authority holds requested information, the Commissioner applies the civil standard of proof which is based on a balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.⁴

32. As mentioned, the public authority conducted searches during the course of the investigation and discovered that it held five emails from 2005 related to the Tay House rent review of 2005.

33. Following a number of queries to establish whether the public authority held additional information, it informed the Commissioner in a letter of 7 November 2012 that the Home Office Property Group transferred the Criminal Injuries Compensation (CICA) deeds and paper files concerning the property management of Tay House to the Ministry of Justice Estate Directorate Asset Management Unit on 7 July 2012. It found these documents to be within the scope of the request but remained of the

⁴ This is in line with the views expressed by the Information Tribunal in *Linda Bromley & Others v The Information Commissioner & Environmental Agency* – EA/2006/0072

view that they were not held (by the public authority) at the time of the request.

34. The public authority explained that CICA occupies the property at Tay house which is leased from Tay Properties and subject to a rent review at 5 yearly intervals. The lease is in the name of The Secretary of State for Communities and Local Government. Prior to May 2007 the CICA was a non-departmental public body of the Home Office and responsibility for the management of its property lay with the Home Office Property Group. In May 2007 the Ministry of Justice (MOJ) was established taking over the duties of the previous Department for Constitutional Affairs and parts of the Home Office. Ordinarily, responsibility for the properties would transfer to the receiving Department but in this case day to day responsibility for the property management of Tay House continued to rest with the Home Office Property Group. There was no Service Level Agreement in place. In accordance with the convention that non-specialist government property be held under the tenancy of The Secretary of State for Communities and Local Government (and before that the Secretary of State for the Environment, Transport and the Regions), the tenant of Tay House was defined in the original lease (dated 8 May 1998) as "The Secretary of State for the Environment, Transport and the Regions" and through the above transfer of functions is now the Secretary of State for Communities and Local Government. The tenancy of Tay House continues to reside with The Secretary of State for Communities and Local Government.
35. Although the lease remains in the name of The Secretary of State for Communities and Local Government, the public authority had 'functional responsibility' for Tay House from May 2007. However, the Home Office Property Group continued to manage Tay House's interest for some time after, including beyond 19 August 2011 (the date of the request). As the Department with 'functional responsibility' for Tay House, the public authority should have been responsible for day to day management including rent review negotiations. However, in practice, the Home Office carried out day to day management of the property and the CICA carried out the rent review itself.
36. Given that functional responsibility for Tay House was with the public authority from May 2007 and beyond 19 August 2011, the Commissioner questions the public authority's assertion that it did not hold the documents transferred from the Home Office at the time of the request. He believes that at the very least, there is scope to argue that the documents were held by the Home Office on behalf of the public

authority within the meaning of section 3(2)(b) FOIA.⁵ Nevertheless, the Commissioner decided not to rule on this point because the public authority decided on its own accord to disclose the relevant documents subject to the application of exemptions.⁶ The complainant is of course entitled to directly challenge the public authority on the application of exemptions to any disclosed documents and he retains the right to complain to the Commissioner in respect of that information if he remains dissatisfied after exhausting the public authority's complaints process.

37. In terms of the nature of searches, the public authority explained that it had dispensed with paper records several years ago as a means of storing its records except for those classified as confidential and above. Searches of its records management in August 2012 revealed the five emails mentioned above. There is nothing in the emails to suggest that any other information is held outside of its electronic records management system. It also explained that initial searches were limited to locations where the requested information is, in the normal course of business, located. i.e. were Tay House to have been managed by the MOJ in the way it manages other properties for which it was responsible and were the MOJ to have undertaken a rent review for those properties, such information would have been located in the areas initially searched by officials.
38. In view of the explanation above, the Commissioner finds that – aside from the five emails from 2005 related to the Tay House rent review of 2005 - on a balance of probabilities, the public authority does not hold additional information within the scope of the request.
39. The Commissioner shares the complainant's frustration at the manner in which the public authority handled this part of his request and notes the inconvenience he experienced as a result. The Commissioner is hopeful that the explanation above would clarify any confusion related to the public authority's responsibility over Tay House in theory and in practice and the implications this had in terms of where information relevant to the request might be located. He has further commented on the handling of the request in the 'Other Matters' section at the end of this notice.

⁵ Section 3(2)(b) states that for the purposes of FOIA, information is held by a public authority if it is held by another person on behalf of the authority.

⁶ The Commissioner understands that the disclosure was made on 21 November 2012

Section 12(1) FOIA – Part 2

40. By virtue of section 12(1), a public authority is not obliged to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit.
41. The appropriate limit is laid down in the Fees Regulations⁷. It is set at £600 for central government bodies, calculated at £25 which equates to 3½ working days.
42. The Commissioner believes that it would have been helpful to the complainant had the public authority described in more detail the searches it would have to conduct to identify and locate documents relevant to the request. The public authority should have also been much clearer to the complainant and to the Commissioner from the outset about whether the fact that most of the properties in its estate are leased in the name of The Secretary of State for Communities and Local Government (DCLG) is likely to ultimately have any bearing on whether it is responsible for the management of those properties (and consequently also whether the requested information would ordinarily be expected to be in its possession). The public authority's rather vague explanation threw up the possibility that the DCLG might actually be the responsible Department for all properties leased in its name and that the information requested could therefore be held by the DCLG. However, as can be clearly seen from the explanation above which was provided much later in the investigation in response to the Commissioner's queries regarding Tay House, it is more likely than not, that day to day management remains with the Department actually occupying a property and not the Department whose name is on the lease.
43. Nevertheless, the Commissioner is mindful of the fact that there are 1700 properties in total relevant to the request. This is a large number, whether in terms of determining if information requested is held or retrieving the information. This includes 131 prisons in the Prison Estate which is vested in the name of The Secretary of State for Justice. As mentioned, the public authority explained that there is no central database of lease and rental arrangements across its estate. Therefore, agreements for individual properties would each have to be reviewed. In terms of properties which do not form part of the Prison Estate, the records for individual properties would be searched to determine if any information relevant to the request is held. Regarding the Prison Estate, it explained that at a conservative estimate, it would take 15 minutes to *'retrieve each file from storage, go through each file, identify which*

⁷ Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

documents might contain information...within the scope of the request, and locate the information within the relevant document'.

44. The Commissioner understood this to mean that relevant records were almost certainly only held manually. However, the public authority had clearly not ruled out the possibility of records also being held electronically. The searches described above relate to the Prison Estate. Therefore, in an email of 3 October 2012, he asked the public authority to clarify if in fact all the relevant records which would have to be searched were only held manually. The public authority did not directly address this query. However, as mentioned, the public authority in response to the Commissioner's queries in relation to Tay House, explained that it had dispensed with paper records '*several years ago*' except for those classified as confidential and above as a means of storing records. The Commissioner understood this to mean that it was more likely than not that all the records relevant to the 1700 properties are held electronically and not manually as the public authority appeared to have initially suggested.
45. However, as the Commissioner has already pointed out, the number of properties is crucial in this case. Therefore, even at a very conservative estimate, it would exceed the appropriate limit to search the relevant records whether held manually and/or electronically for each of the 1700 properties to determine if the requested information is held and/or to extract and provide the information if it is already determined that it is in fact held.
46. In view of the above, the Commissioner finds that the public authority was entitled to rely on section 12(2) to the extent that it could not determine if it held all of the information within the scope of the request. It was additionally entitled to rely on section 12(1) to the extent that it could confirm it held some information (i.e. in relation to the Prison Estate) but could not provide the information because it would exceed the appropriate limit to do so.

Procedural Matters

47. By virtue of section 10(1) FOIA, a public authority is required to respond to a request within 20 working days. The request was made on 19 August 2011 and the public authority did not respond until 19 December 2011. The Commissioner finds the public authority in breach of section 10(1) for failing to respond to the request within 20 working days.

Other matters

48. Although there is no statutory time limit for completing internal reviews, the Commissioner's position is that they should take no longer than 20 working days, and in exceptional circumstances which have been clearly explained to the complainant, the total time taken should not exceed 40 working days. The Commissioner is concerned that the internal review took over 20 working days and he would like to make it clear that this does not represent good practice.
49. The Commissioner would also like to record his concern in relation to the handling of the request. There was clearly some confusion regarding which Department - between the Home Office and the MOJ - was responsible for managing the affairs of Tay House (including rent reviews) from November 2008 to August 2011. Knowing the responsible Department was therefore crucial to determining where the requested information could be located if held or where to target searches. The public authority's explanation to the complainant on 19 December 2011 was not very clear in terms of which of the two Departments was actually responsible for rent review negotiations and therefore likely to hold the requested information. Its response of 29 February 2012 was arguably inaccurate because CICA was responsible for conducting rent reviews for Tay House, not the Home Office. According to the public authority, CICA ceased to be a non-departmental public body under the Home Office in May 2007. It is notable that prior to the public authority's response, the complainant had been advised by the Home Office (in an email of 21 October 2011) that it did not hold the information requested and that the public authority would be best placed to handle the request.
50. Against that backdrop, the Commissioner considers the public authority's responses to the complainant wholly inadequate. It was reasonable for him to expect that the information requested would be held by the Department responsible for managing the affairs of Tay House. In light of the public authority's and the Home Office's responsibilities in that regard and the fact that the Home Office had advised the complainant that the public authority would handle the request, the public authority could have been much clearer as to why it was of the view that it did not hold recorded information. In any event, given subsequent events - i.e. the discovery of emails and the transfer of documents from the Home Office, it is clear that the handling of the request fell short of expected standards. The Commissioner hopes that lessons have been learned from this and that the public authority would improve its handling of similar requests in future.

Right of appeal

51. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

52. 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.
53. 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

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