

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2019

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

Decision (including any steps ordered)

1. The complainant requested certain policies, procedures and standards information in a four-part request. The Ministry of Justice (the 'MOJ') initially only responded to part three of the request for the reasons outlined in this notice, where it said it did not hold the requested information but provided some information at internal review "*outside the FOIA*" on a discretionary basis.
2. During the course of the Commissioner's investigation, the MOJ responded to the remainder of the request in scope (parts two and four only). For part two of the request, it said it did not hold the requested information but provided some information outside the FOIA, again on a "*discretionary*" basis. For part four of the request, it provided some information with redactions made under section 43(2), commercial interests.
3. By failing to provide a response to all parts of the request within the statutory time limit of 20 working days, the MOJ has breached section 10 of FOIA. The Commissioner's decision is that the MOJ has failed to explain whether or not it holds the information in respect of parts two and three of the request. She also finds that the MOJ has failed to demonstrate sufficiently that section 43 of FOIA applies.
4. The Commissioner therefore requires the MOJ to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information for parts two and three of the request under FOIA or issue a valid refusal notice explaining why it is either not held or why it is exempt from disclosure.

- Disclose the information withheld under section 43.
5. The MOJ 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.

Background

6. The complainant submitted a four-part request on 17 October 2018 (see 'Request and response' section below, together with the Annex for full details of the request).
7. Having made contact with the MOJ at the start of her investigation, the Commissioner learned that this request arose from an existing non-FOIA complaint made by the complainant to the MOJ. The complainant had submitted his complaint appeal and the MOJ had decided to handle part three of what it said was an "*appeal against the second stage complaint response*" under the FOIA. The MOJ passed part three only to its FOIA disclosure team to respond to. It told the Commissioner it believed the rest of the complaint would be dealt with by its Customer Investigations team. However, it transpired that the remainder of the complainant's request/complaint was not responded to by any team or area of the MOJ.
8. The MOJ also advised the Commissioner that:

"The Disclosure Team believed that parts 1 and 2 were not FOIA as they related to a previous complaint and had been dealt with under the complaint."
9. Action taken to remedy the outstanding response is set out in the 'Scope' section of this notice.

Request and response

10. On 17 October 2018 the complainant wrote to the MOJ and requested information in the following terms; the full text of the request can be found in the Annex attached to this notice:

"1. Dating of Correspondence

Your letter dated 25th September 2018 was sent to me in an e-mail dated 7th October 2018. Could you please throw some light on this extraordinary discrepancy?

2. Time to Respond to Urgent Correspondence - Registrar [name redacted]

Please provide copies of all GRC ['General Regulatory Chamber'] (MoJ) Standards, Guidance, Policy and Procedures etc. which apply to these service standards.

3. Age Discrimination

Please therefore provide copies of all GRC (MoJ) Standards, Guidance, Policy and Procedures etc. which apply to these Age Discrimination service standards.

4. GRC (MoJ) Complaints Investigation

Please provide copies of all GRC (MoJ) Standards, Guidance, Policy and Procedures etc. which apply to its officers conducting Complaint Investigations."

11. On 21 November 2018, the MOJ responded, late, to part three only of the request. It stated:

"The MOJ does not hold any information in the scope of your request.

The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty is to only provide the recorded information held.

As in your previous request you were sent [sic] The Civil Service has a code of conduct entitled 'The Civil Service code'. Please see the following link

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

12. Following an internal review the MOJ wrote to the complainant on 19 December 2018. It stated that:

"I have looked at the request and response provided to you. I agree with the original response however I do feel a sufficient reason was not provided to you as to why we do not hold the information. To expand on your original response, the MOJ does not hold any information in the scope of your request regarding "What are the GRC (MOJ) standards re addressing Age Discrimination". This is because there is no legal or business

requirement for MOJ to do so.

I attach with this letter two documents for your perusal which I hope shall assist you to obtain an insight.

The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty is to only provide the recorded information held.

Whilst conducting the internal review of the decision I have deciphered that the original decision maker made the decision based on the information provided by the relevant team.

Although the GRC does not hold information/ related to age discrimination explicitly, please find below a link to some information which I hope it may [sic] assist you:

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

In conclusion I am satisfied that the response you received on 21 November 2018 was correct."

13. Included as part of the internal review result were a copy of the Equalities Act 2010 and 'The Public Sector Equality Duty' booklet.

Scope of the case

14. The complainant contacted the Commissioner on 21 February 2019 to complain about the way his request for information had been handled.
15. Having liaised with both parties at the outset of her investigation, the Commissioner identified that only part three of the request had been responded to by the MOJ (as set out in the 'Background' section of this notice).
16. The Commissioner notes that the complainant contacted the MOJ again on 19 December 2018, following receipt of its internal review for part three, with some further questions about the Equality booklet which it had said was released on a 'discretionary basis'. This was treated as a new request by the MOJ and responded to on 7 June 2019. The Commissioner has explained to the complainant that this subsequent request is not part of her current investigation because it is a separate request in its own right, albeit on the same subject matter. She has also informed him of his right to complain about the MOJ's handling of this request following completion of an internal review.

17. In the case under consideration here, the complainant confirmed that he did not wish the Commissioner to consider part one of his request.
18. Therefore, the Commissioner proceeded to ask the MOJ to provide a response under the FOIA to the remaining parts of the request (namely parts two and four as part three has now been responded to).
19. The MOJ subsequently provided its FOIA response to the complainant on 10 June 2019. For part two it said it did not hold the requested information but provided some "*discretionary*" information "*outside the FOIA*". This consisted of documents referenced as a 'Practice Statement Delegation to GRC Staff September 2017' and 'Registrar Governance Arrangements GRC wef [with effect from] 9 April 2013'.
20. For part four of the request, the MOJ provided the complainant with its HMCTS Complaints Handling Guidance, with parts redacted under section 43(2), the exemption for commercial interests.
21. Due to the passage of time from the original request being submitted (ie 17 October 2018) to it being fully responded to (ie 10 June 2019), the Commissioner has exercised her discretion in this case and accepted the complaint without requiring an internal review for parts two and four of the request, the internal review for part three having already been completed.
22. During the course of the Commissioner's investigation, the complainant also advised that he was in possession of additional information in relation to part three of his request, which the MOJ had not provided to him as part of its FOIA response which he believed it should have done.
23. There followed a number of exchanges with the complainant in which the Commissioner attempted to elicit further details; the complainant proposed various suggestions as to how the Commissioner should proceed, all of which she declined.
24. However, the Commissioner made the MOJ aware that the complainant believed more information is held than has been provided for part three of his request. The MOJ advised her that no further information is held that it is aware of.
25. Without further co-operation from the complainant the Commissioner has not considered this matter further, although she does in any event note that the information he is referring to he clearly already has in his possession. Therefore, in the absence of any supporting evidence from the complainant, the Commissioner is unable to consider this matter further within the scope of this investigation.
26. The Commissioner has considered below whether, on the balance of probabilities, the MOJ holds the information requested (which it has

previously provided 'outside the FOIA'), in respect of parts two and three of the request. She has also considered whether the MOJ was entitled to rely on section 43(2) in response to part four of the request.

Reasons for decision

Parts two and three of request - section 1 – general access to information

27. Section 1 of FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and, if so, to have that information communicated to them.
28. In cases where there is some dispute about the amount of information located by a public authority the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to this part of the complainant's request.
29. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
30. In this case, the MOJ provided information to the complainant "outside the FOIA" on a discretionary basis for parts two and three of the request. For ease of reference, the Commissioner has repeated this below:
 - Part two - Practice Statement Delegation to GRC Staff September 2017 and 'Registrar Governance Arrangements GRC wef 9 April 2013'.
 - Part three – copy of the Equalities Act 2010 and 'The Public Sector Equality Duty' booklet.
31. The Commissioner made enquiries as to why the MOJ considered that it did not hold the above information, particularly as it had been able to provide it to the complainant as part of its response.
32. The MOJ's initial response was as follows:

"I think the reason we do not hold the documents is because [the complainant] specifically asked for GRC documents, but the letter explains 'The General Regulatory Chamber Tribunals are a part of

HMCTS do not hold specific 'standards' exclusive to the rest of HMCTS'. Which [sic] I assume that all the policies we do hold are for the whole of HMCTS and there is not any specific to the GRC."

33. The Commissioner contacted the MOJ in relation to this response and learned that the responsible business unit had not been clear regarding its explanation as to why the information released in response to parts two and three was not held. Following further discussion, the MOJ said it believes the business unit interpreted the request as being for information held by the GRC itself and not by HMCTS or the MOJ, but that the information had nevertheless been disclosed to the complainant.
34. The Commissioner is disappointed that, despite her efforts, the MOJ has not provided a definitive explanation regarding its position on this matter and that she has been left unable to determine whether the MOJ itself actually does, or does not, hold the requested information it has nevertheless located and provided to the complainant on a discretionary basis. She therefore requires the MOJ to provide a formal response under the FOIA as set out in paragraph 4 of this notice.

Part four of request – section 43(2) commercial interests

35. For part four of the request the MOJ disclosed an HMCTS Complaints Handling Guide with a number of redactions made under section 43(2).
36. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of the public authority or a third party. The exemption is also subject to the public interest test. In addition to demonstrating that section 43 is engaged, a public authority must consider the public interest arguments for and against disclosure and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
37. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant

prejudice which is alleged must be real, actual or of substance;
and,

- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

38. In this case the MOJ has withheld information relating to payments and to a number of email addresses under section 43(2). By way of explanation, the MOJ told the complainant:

"Some of the information in this document has been redacted as it is exempt from disclosure under section 43(2) of the FOIA, because it would/would be likely to prejudice the commercial interests of the MOJ."

39. It then proceeded to provide brief public interest arguments concluding that the balance lay in favour of maintaining the exemption.

40. In response to the Commissioner's section 43 investigation enquiries, which posed a number of specific questions, the MOJ simply reiterated the explanation above, together with the same public interest test arguments it had given to the complainant, although it made a small addition to its arguments against disclosure.

41. Unfortunately, the MOJ failed to provide any actual response to the Commissioner's questions and it has not explained to her why it believes the section 43 exemption is actually engaged in the first place. Without this explanation its public interest arguments are therefore not relevant.

42. The onus is on a public authority itself to demonstrate that an exemption is engaged and to explain in sufficient detail why it envisages disclosure having the effects described, directly linking these arguments to the contents of the withheld information itself. The Commissioner has afforded the MOJ the opportunity to provide this information. Despite this, no explanation as to why this exemption is relevant on this occasion has not been provided.

43. Similarly, the MOJ has not explained how disclosure of this information would be likely to damage either its own commercial interests or those of third parties. However, if any third parties would be harmed by disclosure, the Commissioner would point out that the MOJ is subject to FOIA and all third parties should be aware of this and the need and importance of public transparency and accountability. The section 43 exemption is there to protect truly sensitive commercial information so future customers should not be deterred from entering into commercial arrangements with the MOJ.

44. In this case, the Commissioner does not consider the MOJ has demonstrated sufficiently that the withheld information is commercially sensitive for the reasons previously given. She therefore does not consider the MOJ's arguments to be compelling enough to warrant the application of this exemption.
45. For the above reasons, the Commissioner is unable to accept that section 43 of FOIA is engaged in this case.

Section 10(1) – time for compliance with a request

46. Section 1(1) of FOIA states:

"(1) 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."

47. Section 10(1) of FOIA states:

"(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

48. The complainant submitted his request on 17 October 2018. The MOJ responded, late, to part three only on 21 November 2018. It did not provide the remainder of its response until the Commissioner had intervened; it did so on 10 June 2019.
49. By failing to respond to any part of the request within the requisite 20 working days, the MOJ has breached section 10(1) of FOIA.

Other matters

50. The Commissioner would ask the MOJ to ensure that it handles future correspondence under the correct process or regime. She considers that unnecessary confusion and delays have arisen in this case by the MOJ deciding to handle only part of what was a non-FOIA appeal stage complaint under the FOIA (ie part three).

51. The Commissioner is further frustrated that the MOJ failed to explain why it said it did 'not hold' information it had nevertheless been able to provide to the complainant albeit 'outside' the terms of FOIA, despite her attempts to secure an explanation. The starting point for handling any valid FOIA request is for a public authority to consider whether or not it holds any of the requested information. The Commissioner has now had to order a step in this notice asking it to deal with this initial consideration almost a year after the original request was made.
52. Similarly, the MOJ has failed to provide any section 43 submissions other than a simple statement that disclosure of the withheld information would, or would be likely to, prejudice its commercial interests, despite having had the opportunity to do so.
53. Further, the MOJ initially failed to provide the Commissioner with the correct versions of the HMCTS booklet it had disclosed under part four; it provided her with an un-redacted version which did not match the redacted version given to the complainant. Having requested the correct version, the Commissioner also asked the MOJ to provide a copy of the withheld information showing the redactions made. The MOJ simply said it had redacted the document electronically and it was left to the Commissioner to compare the redacted and un-redacted versions side by side to determine which information had been withheld. The Commissioner expects that marked up versions of the withheld information should be readily available for her to review in future cases.
54. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"¹ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"².

¹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

55. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.

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

Signed

**Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex

58. The full text of the complainant's request of 17 October 2018 is set out below:

"Complaints Reference [Reference redacted]

About GRC Registrar [Name redacted] and GRC Service/Administration

Thank you for your letter re the above. Unfortunately it was not possible to consider your letter earlier and provide a timely response due to other pressing GRC matters.

It is appreciate [sic] that you are trying to assist in this matter. You make reference to what the Appellant considers are unsatisfactory service standards. It is necessary, since this is a formal complaint, to state if the service standards are unsatisfactory to the GRC (MoJ) when compared with the GRC (MoJ) formal standards.

This process therefore requires the GRC (MoJ) standards to be clarified, and clarification given as to whether or not the complaints are upheld. If some of the service performances are found to be unsatisfactory; it would be appropriate to state specifically what is to be done to address the matter to improve the service to the necessary standard.

1. Dating of Correspondence

Your letter dated 25th September 2018 was sent to me in an e-mail dated 7th October 2018. Could you please throw some light on this extraordinary discrepancy?

2. Time to Respond to Urgent Correspondence - Registrar [name redacted]

Details summarized as follows re stressful situation caused by the GRC Administration errors combined with Appellant's ill health, preventing his foreseeable inability to comply with CMD's:

02/03/18 - Appellant wrote to GRC Admin.

07/03/18 - Appellant to GRC Admin - Very Urgent

08/03/18 - Appellant to GRC Registrar - Very Urgent - No response.

13/08/18 - Appellant to GRC Registrar - Very Urgent - No response.

23/08/18 - Appellant to GRC Registrar - Very Urgent - No response.

27/03/18 - Registrar CMD - Failing to take into consideration above health issues.

In your letter [bottom page 1 & start of page 2] you refer to what the Appellant considered reasonable and acceptable. Please consider these matters against the MoJ GRC standards:

The Appellant realizes that the Registrar's CMD's of 27/03/18 are addressed by GRC Rules separately. Therefore, notwithstanding the CMD, is the GRC's formal Complaint Investigation's finding that the Registrar's response to the Appellant's urgent requests for a response was satisfactory (timely etc.) or unsatisfactory. That is: has the GRC upheld this part of the complaint? If not why not?

Please provide copies of all GRC (MoJ) Standards, Guidance, Policy and Procedures etc. which apply to these service standards.

3. Age Discrimination

I note that re Age Discrimination, you state that:

'I do think that we could have spent more time exploring what we could do to help you by way of reasonable adjustments.' But:

'A person should not be discriminated against because of their age and I don't believe that you have been.'

It is noted that every organization could always spent more time exploring what more it could have done. However the issues in this formal complaint are:

a) What are the GRC (MoJ) standards re addressing Age Discrimination?

b) Were these standards upheld?

c) Are these standards adequate?

Please therefore provide copies of all GRC (MoJ) Standards, Guidance, Policy and Procedures etc. which apply to these Age Discrimination service standards.

4. GRC (MoJ) Complaints Investigation

Please provide copies of all GRC (MoJ) Standards, Guidance, Policy and Procedures etc. which apply to its officers conducting Complaint Investigations."