

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2022

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MOJ) relating to the cost of processing Exceptional Case Funding applications. The MOJ refused to comply with the request citing section 12(2) (cost limit) of the FOIA.
2. The Commissioner's decision is that the MOJ was entitled to refuse to comply with the request in accordance with section 12(2) of the FOIA. He also finds that the MOJ met its obligations under section 16(1) of the FOIA to offer advice and assistance.
3. The Commissioner does not require the MOJ to take any steps.

Request and response

4. On 18 May 2022, the complainant wrote to the MOJ and requested information in the following terms:

"Please could you confirm whether you would be able to process the following revised request? The current unit cost of processing Exceptional Case Funding applications for all matters, based on applications made during the last reported quarter (October to December 2020 i.e. the average cost per application based on management information)."
5. The MOJ responded on 11 June 2021 and refused to provide the requested information citing section 12(2) (cost limit) of the FOIA as its basis for doing so.
6. On 21 July 2021 the complainant wrote to the MOJ to request an internal review.
7. Following an internal review the MOJ wrote to the complainant on 18 August 2021. It maintained its reliance on section 12(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 16 November 2021 to complain about the way their request for information had been handled.
9. The scope of this case and the following analysis is to determine if the MOJ has correctly cited section 12(2) of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

10. Section 1(1) of FOIA states that:

"(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.”

11. Section 12(1) of the FOIA states that:

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.”

12. Section 12(2) of FOIA states that:

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

13. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Fees Regulations’) at £600 for central government public authorities such as the MOJ.

14. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the MOJ.

15. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:

- determining whether the information is held;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it;
- and extracting the information from a document containing it.

16. Where section 12(2) is relied upon, only the first of these bullet points is relevant.

17. A public authority does not have to make a precise calculation of the cost of determining whether the information is held, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/00041*, the Commissioner considers that any estimate must be “*sensible, realistic and supported by cogent evidence*”.

18. The task for the Commissioner in a section 12(2) matter is to determine whether the public authority made a reasonable estimate of the cost of determining whether the requested information is held.
19. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.
20. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

The MOJ's position

21. As is the practice in a case in which the public authority had cited the cost limit under section 12(2) of the FOIA, the Commissioner asked the MOJ to provide a detailed explanation of its estimate of the time and cost of responding to the request.
22. In its submissions to the Commissioner, the MOJ maintained its reliance on section 12(2) of the FOIA and offered an explanation for how it had calculated that the request exceeded the appropriate limit.
23. The MOJ explained that the Legal Aid Agency (LAA), the agency responsible for handling Exceptional Case Funding (ECF) applications, does not record or track the cost of processing applications based on staff time and salaries. Therefore, the requested information is not centrally held.
24. The MOJ explained that this is because the LAA has no legal or business requirement to track the processing of individual applications and the data is not subject to official reporting. Whilst the LAA reports on overall expenditure of staffing costs in its annual report and accounts, it does not specifically report on the operational costs of the ECF scheme.
25. The MOJ explained that whilst the requested information is not centrally held, it may hold information which could be used to estimate the average cost of processing ECF applications. However, the MOJ considers that the cost of determining whether it holds that information would exceed the cost limit.
26. The MOJ considers that in order to provide an estimate of the cost of processing ECF applications, it would need to work out the staffing costs for each application assessed during the time period specified in the request. The MOJ explained that in order to do this, it would need to determine which staff members processed each application. In most

cases, applications are considered by more than one staff member including administration staff and legal advisors. It would also need to calculate how long each staff member spent assessing each application.

27. To determine whether it holds the information which may be able to be used to estimate the average cost of processing ECF applications, the MOJ explained that it would have to manually review each individual ECF application which can contain a large volume of correspondence and evidence.
28. The MOJ stated that during the time period specified in the request, it reviewed approximately 955 ECF applications. In order to review each of the 955 applications within the cost limit, the MOJ calculated that it would have to review each application in under 1.5 minutes. The MOJ does not consider this to be possible.
29. The MOJ estimated that it would take a minimum of 10 minutes to review each ECF application. Therefore, in total the MOJ calculated that it would take 159 hours to determine whether it held information which could be used to estimate the average cost of processing an ECF application (10 minutes x 955 applications = 159 hours). This equates to £3,979. The MOJ stated that it considers its estimate of 159 hours to be conservative.

The Commissioner's position

30. The Commissioner considers the MOJ's estimate of 10 minutes to review each ECF application for information which could be used to calculate the average cost of processing ECF applications to be reasonable.
31. Even if the MOJ was to take only 2 minutes to review each application, the cost of complying with the request would still exceed the appropriate limit.
32. The Commissioner's decision is that the MOJ estimated reasonably that the cost of determining whether it held information which could be used to calculate the requested information would exceed the appropriate limit. Therefore, the DHSC was correct to apply section 12(2) of the FOIA to the request.

Section 16 – advice and assistance

33. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request.

Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).

34. In its initial response to the request, the MOJ advised the complainant that they could submit a new request with a reduced scope. In its internal review response, the MOJ advised the complainant that in order to be able to identify whether it held any information within the scope of the request within the cost limit, the scope of the request would need to be reduced so that the MOJ did not have to review as many ECF applications for information which could be used to estimate the average cost of processing applications.
35. The MOJ advised the complainant that it was unlikely that the scope of the request could be sufficiently reduced so that it fell within the cost limit. It stated that if the complainant was to sufficiently reduce the scope of their request, the MOJ's estimate of the average cost of processing ECF applications would be derived from such a small sample of ECF applications that the estimate would be statistically unsound.
36. The Commissioner considers that this was an appropriate response in the circumstances. He is therefore satisfied that the MOJ met its obligations under section 16(1) of the FOIA.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

37. 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

38. 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.
39. 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

Ben Tomes
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