

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2014

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to guidance on redacting information given to staff involved in handling subject access requests (SARs) made by prisoners. The Ministry of Justice (MoJ) confirmed it held relevant information but refused to provide it, citing section 12(1) of FOIA (cost of compliance exceeds appropriate limit).
2. The Commissioner's decision is that section 12(1) has not been shown to apply.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - issue a fresh response under FOIA.
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 10 March 2014 the complainant wrote to the MoJ and requested information in the following terms:

"Redaction

Please inform me of the regulations in place relating to redaction following a ruling by the Divisional Court 2004.

Please provide me with a copy of the judgement which is not held in the prison library.

Please provide me with the instructions relating to the redaction given to staff employed by the Data Controller of the Ministry of Justice to deal with SARs made by prisoners".

6. The MoJ responded on 10 April 2014. It sought clarification of parts (1) and (2) of the request. It confirmed holding information within the scope of part (3) of the request but refused to provide it citing section 12 of FOIA (cost of compliance exceeds appropriate limit) as its basis for doing so. It advised the complainant that he may wish to refine his request as it might be able to answer a refined request within the cost limit.

7. In requesting an internal review, the complainant told the MoJ:

"To claim that it would take more than 3 working days to respond to this part of my request is not credible.

You have clearly not read and understood my request so let me rephrase it. I want to know what regulations/instructions/guidance are provided to staff employed by the Data Controller of the Ministry of Justice regarding the redaction of documents pursuant to a Subject Access Request under the Data Protection Act. Such regulations /instructions/guidance must be official policy and must be codified and in daily use: otherwise how would staff employed in compiling with SARS know what to redact?"

8. Following an internal review the MoJ wrote to the complainant on 20 May 2014. It told him that it did not consider that he had clarified or refined part (3) of his request. It stated that it had revised its position with respect to parts (1) and (2) and was upholding its position with respect to part (3).

9. Although confirming its refusal of part (3) of the request on the grounds of costs, the MoJ did not provide the complainant with an estimate of the time taken to provide the requested information.

Scope of the case

10. The complainant wrote to the Commissioner on 26 May 2014 to complain about the way his request for information had been handled. With respect to part (3) of his request, he complained about the MoJ's application of section 12, telling the Commissioner he considered the response to be "entirely spurious".
11. In bringing his complaint to the Commissioner's attention the complainant said:

"The information I seek is the official policy on redaction. It simply cannot be the case that individual prison officials have individual policies....It is inconceivable that there is not a central policy".
12. The Commissioner considers the scope of his investigation to be in respect of the MoJ's handling of part (3) of the request. He has considered whether the MoJ was entitled to rely on section 12 as a basis for refusing to provide the information requested in that part of the request. He has also considered whether it was in breach of its obligation under section 16 to provide advice and assistance.

Reasons for decision

Section 12 cost of compliance

13. Section 12(1) of FOIA states that 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.
14. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. 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 in this case.
15. In correspondence with the complainant the MoJ confirmed that it held information within the scope of part (3) of his request. However, it told him that complying with that part of the request would exceed the cost limit.

16. It told him that while the MoJ Data Access and Compliance Unit (DACU) has central oversight of all subject access requests (SARs) made to the MoJ, the Unit is supported by a network of Knowledge Information Liaison Officers (KILOs) and Information Access Representatives (IARs).
17. It also explained that searches would need to be conducted both centrally and locally for the requested information. In respect of the searches it would need to conduct, it told the complainant:

"Whilst guidance is produced centrally in order to support these KILO's and IARs, they may also produce their own material in relation to local processes".

18. It also said that the searches would need to extend back to May 2007 (when MoJ was created) as no timeframe was specified in the request.

Would complying with the request exceed the appropriate limit?

19. During the course of his investigation the MoJ was asked to provide the Commissioner with a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
20. He also asked it to respond to the complainant's view that, given that he was seeking official, central, policy, the MoJ would need to conduct searches both centrally and locally.
21. In its substantive submission, the MoJ explained that its citing of section 12 was as a result of estimating the effort involved in searching personal email accounts across multiple locations.
22. It told the Commissioner:

"Much of this information will reside in email communications from KILOs to other MoJ colleagues. In order to establish whether they had issued instructions regarding redaction and the extent of that instruction, a search would have to be carried out on their personal email account history".

23. In providing the Commissioner with a detailed estimate of the time/cost taken to provide the information falling within the scope of the request MoJ estimated a figure of 20 minutes per communication to perform the relevant determining, locating, retrieving and extracting functions. MoJ also confirmed that a sampling exercise had been conducted using the search terms 'redact', 'redaction' or 'redacting'.
24. Based on the results of the sampling exercise MoJ provided the Commissioner with an estimated cost of at least £8,400,000 to comply

with the request in respect of the emails involving existing KILO staff members. It explained that the cost of compliance would be higher if the search was widened to include ex-KILO members of staff and past and present colleagues in other business units.

Conclusion

25. In the Commissioner's view, the MoJ interpreted the request in this case as seeking information relating to individual instructions, on a case by case basis, about how to redact SARs including specific SARs. In that respect he acknowledges that DACU is supported by KILOs and IARs. He accepts that those business units may potentially have individual requirements in how they carry out redactions when processing SARs. He also accepts that guidance relating to redacting information in the case of a specific SAR may well be held in emails between the business area(s) and individual staff involved in processing the SAR.
26. The Commissioner accepts that the MoJ contacted the complainant, in accordance with its duty under section 16 of the FOIA, to assist him in refining his request in order that it could be dealt with within the costs limit.
27. As a result of this, the response the complainant provided to the MoJ should, in the Commissioner's view, have caused the MoJ to reconsider its interpretation of the request - to exclude local processes. In that respect, the Commissioner notes that the complainant clearly stated that the information he was seeking:

"must be official policy..."
28. In the Commissioner's view, in refusing the request in this case on the basis that compliance will exceed the appropriate limit the MoJ took into account recorded information that fell outside the scope of the request.
29. The Commissioner therefore finds the MoJ was not entitled to rely on the exemption.

Section 16 advice and assistance

30. Where a public authority claims that section 12 is engaged, it should, where reasonable, provide advice and assistance to help the requestor to refine the request so that it can be dealt with under the appropriate limit.
31. The Commissioner considers that the best way to meet this requirement in a case involving the costs exemption will usually be to include a breakdown of the costs involved in meeting the request, and an

indication of what could be provided under the limit, as part of the refusal notice.

32. In the Commissioner's view, the absence of any breakdown of costs contributed to the failure to reach a common understanding of the scope of the request in this case.
33. Although unable to say with certainty that the outcome would have been different, the Commissioner considers it likely that, had the MoJ provided the complainant with an estimate of the work involved in complying with the request, the complainant would have been better able to determine whether his request had been interpreted as being for central MoJ policy on redaction or for local instructions given on a case by case basis.
34. The Commissioner concludes that the MoJ breached section 16.

Other matters

35. The Commissioner recognises that there is no statutory requirement under section 17 for the refusal notice to include an estimate of the costs involved, or any other explanation of why the cost limit would be exceeded. However, in the Commissioner's view, it is beneficial to a public authority to do so, for example to enable the requestor to assess the reasonableness of the estimate. The Commissioner is disappointed that the MoJ failed to provide the complainant with an estimate of the work involved in complying with this request.
36. This may have helped to prevent a complaint to the ICO which in turn would have avoided further time and costs being expended on the request.

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@hmcts.gsi.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

Jon Manners
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