Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **22 January 2019**

Public Authority: **Parliamentary and Health Service Ombudsman**
Address: **Millbank Tower**
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested information about the number of judicial reviews. The Parliamentary and Health Service Ombudsman (PHSO) says it is not obliged to comply with the request under section 12(1) of the FOIA, as it would exceed the appropriate cost and time limit to do so.

2. The Commissioner's decision is that the PHSO is not obliged to comply with the request under section 12(1) and is satisfied that the PHSO met its obligation under section 16 to offer advice and assistance. The Commissioner does not require the public authority to take any steps.

Request and response

3. On 18 May 2018 the complainant made the following request for information under the FOIA:

'In December 2017 the PHSO legal team informed me of the following:

'If you wish to appeal the Ombudsman's decision then you have a period of three months in which to issue judicial review proceedings, this is from the date of the final decision. This is not extended if you request that the decision is reviewed. If you go over that three month period you are likely to be considered by the Court as out of time. THIS IS THE ONLY WAY IN WHICH YOU CAN LEGALLY CHALLENGE THE OMBUDSMAN DECISION.'

The above clearly states that you can ONLY legally challenge the Ombudsman's decision at the stage of the final decision, NOT at the stage of the outcome of a review of that decision.

Bearing in mind the above quoted statement: how many individuals, in the last three years, have made an application for judicial review AFTER the PHSO had completed its review process?

Of those, how many were granted permission to proceed to a full hearing?'

4. On 12 June 2018 the PHSO responded. It refused to provide the requested information citing Section 12 of FOIA as it estimated that the cost of determining whether it held the information would exceed the cost threshold of £450. The PHSO explained that this information was not held centrally.

5. On 12 June 2018 the complainant requested an internal review. He offered to refine the search to the last year or even the last 6 months.

6. The PHSO sent the outcome of its internal review on 25 July 2018 upholding its decision. It explained that the requested information is not held in a way that it is easily retrievable and as files are not kept by '*date reference but by name the same searches would need to be undertaken and the s12 exemption would still apply'*.

Scope of the case

7. On 28 August 2018, the complainant contacted the Information Commissioner to complain about the way the request for information had been handled.

8. The Commissioner's investigation has focussed on whether the PHSO correctly applied section 12 to the request. She has also considered whether the PHSO met its obligation to offer advice and assistance, under section 16.

Reasons for decision

Section 12 – cost exceeds the appropriate limit

9. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to:

    - either comply with the request in its entirety, or
    - confirm or deny whether the requested information is held.

10. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments

and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to the PHSO.

11. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:

    - determining whether it holds the information;
    - locating the information, or a document which may contain the information;
    - retrieving the information, or a document which may contain the information; and
    - extracting the information from a document containing it.

12. 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.

Would the cost of compliance exceed the appropriate limit?

13. As is the practice in a case such as this, the Commissioner asked the PHSO to confirm if the information is held, and if so, to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.

14. In its submission to the Commissioner the PHSO provided an estimate from a legal officer who works in the relevant department and has a thorough knowledge of the particular work area within the scope of the request. PHSO stated that the estimates are based on a sample of the quickest method of gathering the requested information. Also, a search for 'judicial review' by the Information and Records Manager provided 11995 search results.

15. PHSO stated that the information is held within two separate electronic systems:

    'Outlook

    In Outlook our legal team hold approximately 300 files that could potentially involve litigation. We would need to search through each file to check which ones do involve litigation. We estimate it would reasonably take 5 minutes to go through each file in Outlook so that we can establish which ones were litigated, once we have established these, it is estimated that there could be 15 to 20 files and it would take 15 to 30 minutes to go through each file to locate the information.

Time required: 25 hours to identify the litigated files. Then 5 to 10 hours to go through those files = 30 to 35 hours to go through the Outlook files.

Meridio/Sharepoint

In addition we would have around 110 files that relate to litigation. We would need to go through each of these, the time estimate to do so is 15 to 30 minutes. As not all of the information is contained on the file once it is identified in addition to a search on that file, we may need to look at previous emails or contact the former case holders for further information.

Time required: 15 to 30 minutes per file x 110 = 27.5 hours to 55 hours

Total time required: 57.5 to 90 hours.'

16. The Commissioner considers that this is a generous estimate of time to search through a file but even if the estimates were halved, the total time would still exceed the 18 hour limit.

17. Therefore, the Commissioner is prepared to accept that the PHSO would take more than the 18 hour limit to respond to the request as phrased and is satisfied that the PHSO is correct to apply section 12(1) to the request.

Section 16(1) – The duty to provide advice and assistance

18. 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 practice (the "code")[1] in providing advice and assistance, it will have complied with section 16(1).

19. The Commissioner notes that when asked by the complainant to consider a shorter period of time for the request, the PHSO explained that the same searches would need to be undertaken as the files are kept by name and not by date. Therefore, the Commissioner is satisfied that the PHSO complied with section 16.

[1] htthttps://www.gov.uk/government/publications/freedom-of-information-code-of-practice

Right of appeal

20. If 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

21. 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.

22. 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 .....

Pamela Clements
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