

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2019

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

Decision (including any steps ordered)

1. The complainant requested information about Prince's Consent in relation to a specific piece of legislation.
2. The MoJ denied holding the requested information.
3. The Commissioner's decision is that, on the balance of probabilities, the MoJ did not hold information within the scope of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 14 May 2019, the complainant wrote to the MoJ and requested information in the following terms:

"My request concerns the issue of Prince's Consent for The Coroners and Justice Bill 2009 later the Coroners and Justice Act 2009.

Please note that the reference to Secretary of State should be taken to mean the Secretary of State himself and or anyone in his private office responsible for corresponding and communicating with the Duke of Cornwall and or Duchy of Cornwall on his behalf.

Please note that reference to the Duke of Cornwall should be taken to mean the Duke himself, his private office, the Duchy of Cornwall Estate and the Duchy's legal advisers.

Please note that I am interested in receiving all relevant documentation irrespective of when during the Bill's development and legislative passage it was generated. I am conscious that at some stage of its development the bill may have been known by another title. I would also like to receive the information relevant to that other title.

1. Did the Secretary of State and or anyone acting of his behalf write to the Duke of Cornwall seeking Prince's Consent for the piece of legislation known as The Coroners and Justice Bill 2009 - later the Coroners and Justice Act 2009.

2. If the answer to question one is yes can you please provide copies of this correspondence and communication including any emails. Please do include copies of any supporting documents which were submitted along with the correspondence and communications.

3. Did the Duke of Cornwall or anyone acting on his behalf reply to this correspondence and communication.

4. If the answer to question three is yes can you please provide copies of this correspondence and communication including any emails. Please do include copies of any supporting documents which were submitted along with the correspondence and communication.

5. Were any changes made to the aforementioned piece of legislation at the behest of the Duke of Cornwall, the Duchy of Cornwall, the Duke's private office or his legal advisers.

6. If the answer to question five is yes can you please detail these changes and provide copies of any relevant written correspondence and communications which relate to those changes.

7. Please note if any relevant information has been destroyed can you please provide the following details. In the case of each destroyed piece of correspondence and communication can you provide details of the date it was generated and the date it was destroyed. In the case of each destroyed piece of correspondence and communication can you provide details of the sender and recipient as well as a brief outline of its contents. If destroyed documentation continues to be held in another form can you please provide copies of that documentation".

6. The MoJ responded on 6 June 2019. It denied holding the requested information.
7. Following an internal review the MoJ wrote to the complainant on 5 July 2019 maintaining its position.

Scope of the case

8. The complainant contacted the Commissioner on 12 July 2019 to complain about the way his request for information had been handled. He was concerned both with the overall conclusion and the MoJ's original response. He considered:

"... that a more inexperienced requester may have taken the statement at first value and concluded that the department had no involvement with the legislation".

9. He was also concerned that the MoJ had ignored the references to destroyed documents in his original request.
10. The analysis below considers whether, on the balance of probabilities, the MoJ held information within the scope of the request.

Reasons for decision

Section 1 – general right of access

11. Section 1 of the FOIA states that:

"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."

12. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a

judgement whether, on the balance of probabilities, a public authority holds any information within the scope of the request.

14. In this case, the Commissioner has sought to determine whether, at the time of the request and on the balance of probabilities, the MoJ held information within the scope of the request.
15. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

The complainant's view

16. The complainant disputed that the MoJ did not hold relevant information.
17. He noted that the MoJ was the sponsoring department for the Bill:

"... and that online parliamentary records show that both Prince's and Queen's consent was sought for the legislation".

The MoJ's view

18. In its initial correspondence with the complainant, the MoJ told him that it did not hold the requested information as there was *"no legal or business requirement for the MoJ to do so"*.
19. In subsequent correspondence with the complainant, it clarified its response, confirming that the consent of both the Queen and the Prince of Wales were sought, and given, for the Coroners and Justice Bill 2009.
20. The MoJ told the complainant:

"... it is a standard practice, where the Prince of Wales' consent is sought for the Bill Minister's Private Secretary to write to the Prince's Principal Private Secretary setting out how the Bill would affect the interest of the Duchy or Crown".
21. However, in support of its view that it did not hold the requested information, the MoJ also explained that ministerial correspondence over five years old is manually destroyed and digital records are automatically deleted in line with the MoJ Record Retention and Disposition Schedule.
22. The MoJ acknowledged that it would have been helpful if its initial response to the complainant had included that explanation.

23. During the course of her investigation, the Commissioner asked the MoJ to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the MoJ established whether or not it held the requested information.
24. With respect to the complainant's concern about the MoJ's handling of part (7) of his request, the Commissioner asked the MoJ to explain why no information within the scope of that part of the request was held.
25. The MoJ confirmed that the initial request and subsequent review looked through the relevant locations on a shared drive. It provided the Commissioner with details of the search terms used. It also confirmed that senior staff in the relevant policy team were spoken to about the request, and a comprehensive search of the MoJ's IT systems undertaken.
26. The MoJ also told the Commissioner that, following her intervention, it had carried out a further review. It told her it had examined the hard copy filing systems and electronic systems *"to confirm whether our original decision stood"*.
27. The MoJ told the Commissioner that it did not find any relevant documents. However, it told her:

"This is not surprising, as the documents requested would have been created prior to 2009. The Department's document retention policy would mean any documents held would have been deleted and destroyed after five years".
28. In support of its view, the MoJ provided the Commissioner with details of its record retention and disposition schedules¹ and confirmed that the 'MoJ Headquarters RRDS [Record Retention and Disposition Schedule]' applies in this case.
29. With respect to the information requested at part (7) of the request, the MoJ told the Commissioner:

"There is no record of any relevant documents' destruction and there is no evidence of, or reason to believe that, the documents or copies of these documents would be held at a different location (i.e. not in MoJ's IT systems)".

¹ <https://www.gov.uk/government/publications/record-retention-and-disposition-schedules>

The Commissioner's view

30. While appreciating the complainant's frustration that the MoJ did not hold the requested information, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)² which explained that the FOIA:

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

31. Having considered the MoJ's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the civil standard of the balance of probabilities, the MoJ did not hold information within the scope of the request.
32. The Commissioner therefore considers that the MoJ complied with its obligations under section 1(1) of the FOIA.

Other matters

33. The code of practice issued under section 46 of the FOIA (the 'section 46 code') set out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
34. Failure to conform to the section 46 code is not, in itself, a breach of FOIA or the EIR; however the Commissioner promotes the observance of the code.
35. The Commissioner wishes to refer the MoJ to the section 46 code and expects that it will have due regard to its recommendations in future.

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<http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

Right of appeal

36. 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

37. 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.
38. 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
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