

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 February 2019

**Public Authority:** Crown Prosecution Service  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### Decision (including any steps ordered)

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1. The complainant requested information from the Crown Prosecution Service (CPS) relating to the total costs to date of external counsel in a specified court case.
2. The CPS initially denied holding any information within the scope of the request. During the Commissioner's investigation, it located and disclosed some relevant information to the complainant.
3. The Commissioner's decision is that, on the balance of probabilities, the CPS did not hold any further information within the scope of the request and it therefore complied with the duty set out at section 1(1) (general right of access) of FOIA.
4. The Commissioner did, however, find a procedural breach of section 10 (time for compliance) of the FOIA.
5. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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6. On 14 September 2018, the complainant wrote to the CPS and requested information in the following terms:

*"Please confirm the total costs to date of external counsel in the case of R v [name redacted] - as referred to here:*

...

*These costs should include the fees and costs charged by:*

[name redacted] QC  
[name redacted]  
[name redacted] QC

*and the fees of any other external counsel who has worked on the case. The costs should be accurate at the date that you respond and should include all costs incurred to date (not simply costs actually paid to date)".*

7. The request was made via the 'whatdotheyknow' website.
8. The CPS responded on 1 October 2018. It denied holding the requested information.
9. Following an internal review the CPS wrote to the complainant on 26 October 2018 maintaining its original position.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 26 October 2018 to complain about the way her request for information had been handled.
11. She told the Commissioner:

*"The case has already been outstanding for over 18 months and the CPS will have a record of these costs. I specifically asked for the total costs **to date** and even after an internal review I've not been successful in procuring this information".*
12. With regard to the Commissioner's preference to resolve matters informally where possible, the complainant told the Commissioner:

*"For the avoidance of doubt, I always want a decision notice against any public authority now. You don't need to ask my opinion about this in the future - I will always want a decision notice".*
13. During the course of the Commissioner's investigation, the CPS confirmed, with regard to the information requested, that at the time of the request, it did not hold "all costs incurred to date".
14. It confirmed, however, that, having revisited its handling of the request, it did hold details of a payment that had been made to external counsel for written pre charge advice. It provided the complainant with those details.

15. The complainant did not respond with regard to that disclosure. However, in light of the complainant's statement above, the Commissioner continued her investigation.
16. The analysis below considers whether, on the balance of probabilities, the CPS held further information within the scope of the request at the time the request was made.

## **Reasons for decision**

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### *Section 1 - general right of access*

17. 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."*

18. 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.
19. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the CPS held further information within the scope of the request.
20. 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.
21. Mindful of the wording of the request, the Commissioner accepts that the complainant is seeking *"all costs incurred to date (not simply costs actually paid to date)"*.
22. In correspondence with the complainant, the CPS told her that it did not hold the requested information as the case had not been finalised. It explained:

*"Therefore there have been no Counsel fee payments recorded or accrued. This will not occur until the case has had the trial and has been finalised".*

23. The complainant acknowledged that the case specified in the request had not concluded, and therefore that the CPS would not know the total costs of the case. However, in her view, the CPS should hold the requested costs *to date* as the case had been ongoing for some months.
24. During the course of her investigation, the Commissioner asked the CPS 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 CPS established whether or not it held the requested information.
25. In correspondence with the Commissioner, the CPS said:

*"...generally speaking the accrual and payment of fees takes place when a criminal case has concluded".*
26. The CPS advised that the conclusion of a case is normally when an acquittal has occurred or when sentencing has taken place following a guilty outcome. The CPS confirmed that, at the time of the request, the trial in the specified case had not concluded.
27. The CPS explained that it operates a Graduated Fees Scheme for payments to counsel. It told the Commissioner:

*"... Once a criminal case has concluded counsel would normally submit the fees due and that would then be assessed by the CPS.  
...."*
28. The CPS provided the Commissioner with details of the searches it had conducted for the requested information. It confirmed that the relevant CPS Area and the Complex Casework Unit had been consulted. It also confirmed that the casework management system (CMS) of electronic records had been searched.
29. By way of further explanation as to why it did not hold further information within the scope of the request, the CPS told the Commissioner that, while it does estimate its spend to the end of the financial year, it does not routinely estimate the costs of individual criminal cases while a case is subject to live proceedings.

30. While appreciating the complainant's frustration that, at the time of the request, the CPS 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)<sup>1</sup> 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 CPS's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the CPS did not hold further information within the scope of the request at the time of the request.
32. The Commissioner therefore considers that the CPS complied with its obligations under section 1(1) of the FOIA.

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

33. Section 10(1) of the 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."*

34. As the CPS did not communicate held information to the complainant within 20 working days, it breached section 10(1) of the FOIA. As the response has been issued no steps are required.

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

## Right of appeal

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.

37. 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**