

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2018

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

Decision (including any steps ordered)

1. The complainant has requested data relating to 'lessons learned' within the Ministry of Justice from reviews of some of its projects and programmes from the government's Major Projects Portfolio.
2. The Commissioner decided that the Ministry of Justice was entitled to rely on section 12(1) FOIA (cost of compliance exceeds appropriate limit) to refuse the requests and that it was entitled to aggregate three of the requests under section 12(4) FOIA and the Fees Regulations. The Ministry of Justice had also provided the complainant with advice and assistance in accordance with section 16(1) FOIA.
3. The Commissioner does not require the Ministry of Justice to take any steps.

Request and response

4. On 26 July 2017 the complainant wrote to the Ministry of Justice (MOJ) making the following requests for information under FOIA:

FOI Request 113357 (request 1)

Could you please forward information relating to lessons identified or learned during the course of programme/project delivery on the following programmes/ projects:

- *Legal Aid Transformation Programme (LAT)*

- *MoJ Shared Services Evolve (SS Evolve) Programme*
- *North Wales Prison (NWP) Programme*
- *NOMS ICTS Services (NICTS) Programme (formally part of Quantum Recompete Project)*

FOI Request 113358 (request 2)

Could you please forward information relating to lessons identified or learned during the course of programme/project delivery on the following programmes/ projects:

- *Her Majesty's Courts and Tribunals Services (HMCTS)*
- *Compliance & Enforcement Services Project (CESP)*
- *Her Majesty's Courts and Tribunals Services (HMCTS) Reform Programme*
- *Integrated Delivery Programme (IDP)*

FOI Request 113359 (request 3)

Could you please forward information relating to lessons identified or learned during the course of programme/project delivery on the following programmes/ projects:

- *Prison Unit Cost Programme (PUCP)*
- *Transforming Rehabilitation (TR) Programme*
- *Transforming Prisoner Telephony (TPT)*
- *Secure Training centre (STC) Retendering Project*

FOI Request 113360 (request 4)

Could you please forward information relating to lessons identified or learned during the course of programme/project delivery on the following programmes/ projects:

- *CJS Efficiency Programme (CJS Efficiency)*
- *Common Platform (CP) Legal Aid Crime Change (LACC) Programme*
- *Electronic Monitoring (EM)*
- *Future IT Sourcing Programme (FITS)*

5. On 23 August 2017 MOJ responded and refused to provide the requested information citing the section 12(1) (cost of compliance) FOIA exemption. MOJ confirmed that it held some of the information requested. It aggregated the requests and decided that to provide information as the aggregated request required would exceed the appropriate cost limit.
6. On 1 November 2017, following an internal review, MOJ decided that it had been wrong to aggregate the requests but still relied on the section 12(1) FOIA exemption to withhold the information. On 2 November 2017, unusually, MOJ offered to provide the complainant with some information about requests 1, 2 and 3 outside of FOIA; however the complainant said that he had not so far received this information.

7. MOJ also added that it might be able to answer a refined request within the cost limit. MOJ invited the complainant to consider, for example, reducing the volume and scope of the information but added that it could not guarantee that a refined request would fall within the FOIA cost limit, or that other exemptions would not apply.

Scope of the case

8. On 14 November 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that he had made numerous requests to over 40 public authorities, including a wide range of government departments, in an effort to identify the lessons learned arising from major projects, all of which were part of the government's top 143 projects in its Major Projects Portfolio.
9. The Commissioner considered whether MOJ had correctly refused the request under section 12(1) FOIA. In particular whether or not it had been entitled to aggregate the requests (as in the MOJ refusal notice).
10. She also considered whether MOJ had offered the complainant sufficient advice and assistance in narrowing down the scope of his requests to have complied with section 16(1) FOIA (duty to provide advice and assistance).

Reasons for decision

Section 12 – Cost of compliance exceeds appropriate limit

11. Section 12(1) FOIA allows a public authority to refuse a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244 ("the Fees Regulations.")
12. The appropriate limit is set in the Fees Regulations at £600 for central government departments and £450 for all other public authorities. The Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour of staff time, meaning that section 12(1) FOIA effectively imposes a time limit of 24 staff hours for the MOJ for an individual request.

13. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating a document containing the information;
 - retrieving a document containing the information; and
 - extracting the information from a document containing it.
14. The four activities are sequential, covering the information retrieval process of the public authority.
15. In this matter, the complainant told the Commissioner that he had submitted numerous requests to MOJ (and to other government departments) over a period of around 5 months. Noting the responses to other requests he had assumed that packaging the requests into four projects at a time would fit within the cost limit for MOJ. He said he understood from case law that MOJ had been incorrect to amalgamate the requests; their internal review had agreed with his position. On the basis that it was incorrect to amalgamate the requests, the cost limit should apply to each request separately. He added that confirmation of the ICO position on this would help him to structure any future requests.
16. The complainant said that his requests had all been about projects from the Major Projects Portfolio (i.e. the top 143 Programmes or projects within the government portfolio). These were subject to a large amount of governance, hence he considered that the information should be discoverable and accessible. He believed that MOJ had an obligation to share any lessons learned, via FOIA. He added that the failure to learn lessons was costing the UK billions of pounds and there was no imperative to do anything about it. By pressing for evidence across multiple public authorities he said he could challenge how government leveraged these investments for the benefit of society.
17. The Commissioner found that MOJ had answered request 4.
18. With regard to requests 1 – 3 MOJ estimated, and the Commissioner accepted, that the total cost of compliance would be around £1012. MOJ said that this estimate was based on it needing 90 minutes to review the contents of each of 15 electronic files and a further 90 minutes in other contacts with each of the 12 business units involved; there was no over-arching record of the requested information and no central record of it had been made.
19. MOJ added by way of further explanation that no sampling exercise had been undertaken, however an estimate of the time taken to complete the relevant activities had been made and a cost calculation form

completed. MOJ said that the person coordinating the response would have to identify and get in touch with at least 12 different business units and, on the assumption that the correct contact(s) were identified from the outset, estimated that this engagement alone would take at least 90 minutes. Going through the relevant files to pick out the relevant documents was also estimated to take approximately 90 minutes. MOJ said that in some instances, the lessons learned documents did not stand alone but were parts of other documents, such as programme reports or National Audit Office reports. Due to the length of time that has passed since some programmes had closed, there were some considerations to be made on whether some records would be caught by records retention policies. If the documents could not be found, MOJ said it would have to look through records of documents that might have been destroyed, in order to determine and confirm whether or not it could produce some of the lessons learned documents.

20. MOJ added that there was ambiguity in the generalisation of some of the requests, which would have required more time and effort to ascertain exactly what was held and what was required. For example, the request for *Her Majesty's Courts and Tribunals Services (HMCTS) Reform Programme*; this had covered a range of initiatives and projects that had been delivered over a number of years.
21. MOJ confirmed that its estimate had been based on the quickest method of gathering the information requested. MOJ said it was a large organisation and, since the requested documentation cut across a broad range of subjects, the main issue had been mainly about the volume and diversity of the information requested. The documents, if held, were not stored centrally, but rather within individual business units across MOJ. MOJ said it had taken reasonable steps, based on the quickest methods, to locate the information. Each of the most likely relevant business areas had been contacted and had searched their records where possible. As a result of this search, some documents had been located, hence MOJ's decision to provide some information, outside of FOIA.
22. The corollary of this is that, if the requests are aggregated then the appropriate limit of £600 is exceeded and the request has been refused correctly. If, however, the requests are considered separately then, since the cost of compliance would be spread over three requests rather than one, the cost limit might then not be exceeded and MOJ could not rely on the section 12(1) FOIA exemption to refuse to provide the information.
23. The pivotal issue is therefore whether MOJ had been entitled to aggregate requests 1 – 3, as it had done initially or whether the requests should have been considered separately.

Section 12(4) – Aggregation of related requests

24. Under section 12(4) FOIA, when a public authority is estimating whether or not the cost of compliance with the legislation would exceed the appropriate limit, it may aggregate two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied.
25. Regulation 5 of the Fees Regulations provides that:
- “(1) ... where two or more requests for information... are made to a public authority—*
- (a) by one person, or*
 - (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*
- the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.*
- (2) This regulation applies in circumstances in which—*
- (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*
 - (b) those requests are received by the public authority within any period of sixty consecutive working days.”*

26. The Commissioner has issued guidance on compliance with section 12 FOIA (“the guidance”):
(https://ico.org.uk/media/fororganisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf).

This states that:

 - 44. Regulation 5(2) of the Fees Regulations requires that the requests which are to be aggregated relate “to any extent” to the same or similar information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.*
 - 45. A public authority needs to consider each case on its own facts but requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.*

27. In this case, the Commissioner has seen that the requests under consideration were submitted by the same person, on the same day. Each related to lessons learned from one of 143 major government programmes and projects. The complainant has submitted over 40

information requests to MOJ and other public authorities. The requests to MOJ follow the common thread or overarching theme of seeking to know what lessons have been learned from each programme or project.

28. The complainant said that he had submitted numerous requests to MOJ over a period of around five months. Noting the responses to other requests that he had submitted he had assumed that packaging the requests into four projects at a time would fit within the cost limit. That was 6 hours per project to uncover the lessons identified. If it took longer than 6 hours he suggested that no-one was learning lessons from billions of pounds of government expenditure, something he saw as being of major public interest. His understanding of the case law was that MOJ were incorrect to amalgamate the requests. He added that MOJ's internal review had agreed with his position.
29. The complainant said he had evidence that the failure to learn lessons was costing the UK billions of pounds and that there was no imperative to do anything about it. Pressing for evidence across multiple authorities would enable him to challenge how government leverages these investments for the benefit of society.
30. MOJ said at internal review that the original requests had been aggregated because the requests were received on the same day and were considered to be for similar information.
31. In estimating the cost of providing the information, MOJ said that no sampling exercise had been undertaken, although an estimate of the time taken to complete the necessary activities was made and a cost calculation form completed. In some instances, the lessons learned documents were not standalone documents, but rather parts of other documents, such as programme or National Audit Office reports. Each project had delivered its own lessons learned, but there was no overarching document or central record of these. At internal review, MOJ had therefore determined that the cost of finding and collating this information would cost more than the £600 cost limit. In making this estimate, MOJ necessarily aggregated the requests for this purpose.
32. The Commissioner has seen that when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the fees regulations are satisfied. Those conditions require the requests to be:
 - made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - made for the same or similar information; and
 - received by the public authority within any period of 60 consecutive working days.

33. The ICO guidance on the application of section 12 FOIA considers the aggregation of requests. The wording of Regulation 5 of the Fees Regulations – that the requests need only to relate “to any extent” to “the same or similar information” - provides for a broad interpretation when considering aggregation. The guidance says that:
- “requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.”*
34. In this case, there was an overarching theme, or common thread, of retrieving information relating to ‘lessons learned’ from different business areas within MOJ, with data relating to a broad range of projects. Taking into account the nature of the information requested, the Commissioner determined that there was an overarching theme and common thread of ‘lessons learned’ data in each case.
35. The Commissioner considered that, even though the requested ‘lessons learned’ would have been produced in relation to multiple specific projects, the nature of the information requested about all of those projects was “the same or similar” across each request. Therefore, in the circumstances of the case and in line with other comparable ICO decisions, the Commissioner decided that MOJ was entitled to aggregate the requests. She therefore considered that the estimated £1012 cost of complying with the aggregated requests would have comfortably exceeded the appropriate limit of £600 and that MOJ had been correct to rely on the exemption at section 12(1) FOIA.

Section 16 - advice and assistance

36. Section 16(1) FOIA provides that a public authority should give advice and assistance to any person making an information request, where it would be reasonable to expect it to do so. Section 16(2) FOIA clarifies that, providing an authority conforms to the recommendations as to good practice contained within the Section 45 FOIA Code of Practice (“the Code”) issued by the Secretary of State, it will have complied with section 16(1).
37. The Code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) FOIA and the Fees Regulations, the cost of complying would exceed the appropriate limit, it should provide the complainant with reasonable advice and assistance.
38. The ICO guidance states that the minimum a public authority should do in order to satisfy section 16(1) FOIA is to indicate if it is able to provide any information at all within the appropriate limit. MOJ did not specifically address the section 16 requirement in its correspondence

with the complainant but did invite him to consider reducing the volume and scope of the information requested. No other action appears to have been feasible and the Commissioner does not require any.

39. MOJ did locate some relevant documents and offered to provide these on a discretionary basis outside of FOIA. However, and regrettably, the complainant has still not received these documents; the Commissioner invited MOJ to provide them now.

Other matters

40. The Commissioner was concerned to see that MOJ had taken almost three months to conduct its internal review which was far in excess of the 20 working days that she regards as the normal maximum time that it is reasonable for an authority to take. She was also disappointed at the low level of engagement by MOJ with her office at times during her investigation. Both issues have been noted for possible future reference and regulatory action.

Right of appeal

41. 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

42. 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.
43. 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

Dr Roy Wernham
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