

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2018

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested a specified 'National Forum' file. The Ministry of Justice (the 'MOJ') responded and said that it no longer held the requested file because it had been destroyed in February 2018, in accordance with its relevant retention and disposal schedule.
2. The Commissioner's decision is, on the balance of probabilities, that the MOJ no longer holds the requested file on account of its destruction.
3. The Commissioner does not require the MOJ to take any steps.

Background

4. The complainant has provided the Commissioner with a chronology which shows he had contacted both the Attorney General's Office and the Home Office in 2017 in relation to the requested file, prior to making his request to the MOJ. He was informed by the Home Office on 26 May 2017 that the specified file had been transferred to the MOJ; that same day he made a request for the file to the MOJ, citing reference number 'PN92 0004/0301/006 - National Forum'.
5. On 30 May 2017, the MOJ contacted the complainant informally asking him "to confirm which area of the MOJ is likely to hold this file and, if you can, provide any background as to the contents of the file".
6. The complainant responded on the same day telling the MOJ to instead refer to the Home Office. Without further information on the contents or subject of the file, a formal response was sent by the MOJ to the

complainant asking him to provide further details in line with section 1(3) of FOIA.

7. The complainant has told the Commissioner that he did not provide the MOJ with any further detail, partly for personal reasons, and partly because he had already contacted other organisations in relation to the file. He also said he felt that the onus to provide further information should not have been on him, particularly as he did not have any more detail. The matter was then left until he made his current request, which is the subject of this notice.

Request and response

8. On 15 June 2018, the complainant wrote to the Ministry of Justice and requested information in the following terms:

"I note you have yet to provide me with file named 'PN92 0004/0301/006 - National Forum'.

I made an application for this file on 27 May 2017 under the Freedom of Information Act and provided and referred you to my FOI response from the Home Office (HO ref 40252) as a lead on how to locate this file. I am not in a position to provide further help. Please respond to this request as a matter of urgency."

9. On 12 July 2018 the MOJ responded. It denied holding the requested information, advising that the file had been reviewed by its Departmental Library and Records Management Service on 1 November 2016 and did not meet the preservation criteria for The National Archives. The MOJ confirmed that the file had subsequently been destroyed on 9 February 2018 in accordance with its Records Retention and Disposition Schedule.
10. The complainant requested an internal review on 16 July 2018. This was provided by the MOJ on 8 August 2018; it maintained that the requested file was not held following its destruction in line with the aforementioned retention policy.

Scope of the case

11. The complainant contacted the Commissioner on 16 July 2018, the same day as he had submitted his internal review request, to complain about the way his request for information had been handled. He stated:

"I wish to complain in the strongest terms about the MOJ failure to comply with my original request within the time limit, and the subsequent destruction of the file I requested - despite their knowledge of possession of the document six months before I asked for it. It is unacceptable that the burden of locating the file within the MOJ should be placed on the applicant.

I believe this file was of utmost importance to the the [sic] ongoing public inquiry into undercover policing (UCPI). I am concerned it may have been destroyed on purpose so that the inquiry would not see it."

12. He has also contended that, in light of ongoing public inquiries into child abuse and undercover policing, a moratorium on the destruction of corporate Home Office information has been in place since October 2014, and in March 2015 the Permanent Secretary extended this to include all information held and owned by the Home Office group including (but not limited to) paper files, case files and digital information.
13. There followed a number of telephone conversations between the Commissioner and the complainant to clarify the scope of this investigation. The Commissioner has explained that she is unable to investigate issues concerning the request of 26 May 2017 because the complainant had not complained about this to her until now - the usual timescale being within three months of the last communication from the public authority. Furthermore, even if the Commissioner were to accept this complaint under 'exceptional circumstances', she would only be able to consider whether the MOJ was entitled to cite section 1(3) of FOIA, as that was the stage that request had reached.
14. She also clarified that the MOJ was not late in responding to the request of 26 May 2017; it had replied seeking clarification within 20 working days and it is entitled under section 1(3) of FOIA to seek further information to enable it to deal with a request.
15. The complainant's view quoted above states that the MOJ may have destroyed the file "*on purpose so that the inquiry would not see it*". The Commissioner therefore made enquiries with the MOJ to determine whether it was aware that a previous FOIA request (which remained

unfulfilled due to further clarification being required) had been made for the file prior to its destruction. She is mindful that FOIA requests are handled by the MOJ's Disclosure Team and that the MOJ is a large entity, made up of various departments and executive agencies.

16. With respect to the 15 June 2018 request, the Commissioner confirmed that as her remit is to determine whether recorded information is held relevant to that request, her investigation can only consider whether or not the requested information is held by the MOJ.
17. However, the Commissioner also clarified that, because the requested file had been destroyed in the period between the complainant's initial and subsequent request, she would need to ask the MOJ some additional questions that would relate to the previous request.
18. In this case therefore, the Commissioner has determined whether, on the balance of probabilities, the requested file is held by the MOJ.

Reasons for decision

Section 1 – general right of access

19. Section 1 of 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."

20. The task for the Commissioner here is to determine whether, on the balance of probabilities, the MOJ holds any information relevant to the request which it has not disclosed to the complainant. Applying the civil test of the balance of probabilities is in line with the approach taken by the First Tier Tribunal when it has considered the issue of whether information is held in past cases.
21. As part of her 'information not held' investigation, the Commissioner asked the MOJ about the searches it had undertaken in order to respond to the complainant's request. In this case she wished to understand why the file could not be located without further details from the complainant at the time of his first request (26 May 2017), but, apparently without any other detail being provided, the MOJ was able to identify the file and

confirm it had been destroyed at the time of the second request (15 June 2018).

22. In reply, the MOJ said it disagreed that the complainant could not provide further details in relation to the 2017 request. It argued that it was reasonable to believe that the complainant knew something about what the contents of the file would be, or what it would relate to, otherwise he would not have reason to request the data. It said that if the complainant had provided any of these details at the time of his 2017 request, then searches could have been made.
23. It is clear that the complainant did provide a Home Office file reference in his initial request. However, the MOJ has explained that there is no central system for its Disclosure Team to search such reference numbers. It clarified that, as well as itself, there are also a number of executive agencies including HM Courts and Tribunal Service and HM Prisons and Probation Service and that the file could have been passed to any of these; some indication as to the type of information held in the file may have assisted it in directing its enquiries appropriately. It said that the MOJ's Disclosure Team only have a finite knowledge of the MOJ as a whole and which area the requested information may be held in.
24. It acknowledged that the complainant cannot be expected to have detailed knowledge of the way in which the MOJ organises and structures its records; however it maintained that it is not unfair to say that the complainant could have provided further details about the information requested. Furthermore, it highlighted that there is no obligation or onus on the MOJ under FOIA to make enquiries with another public authority to find out the information required in order to respond to a request.
25. In response to the Commissioner's enquiries, the MOJ has advised that between the time of the original request in May 2017 and the re-submitted request of June 2018, there were no communications between its Disclosure Team and its Records Management Team. However, the MOJ has provided the Commissioner with a copy of its communications regarding the initial request which are brief email exchanges between members of its Disclosure Team.
26. Although the MOJ maintains that it was entirely reasonable for it to issue a clarification for the initial 2017 request, following the second request in June 2018, enquiries were made with the Home Office and the Records Management Team. Although there was no further information provided by the complainant, and there was no obligation to undertake what would be a random search, the MOJ advised that an individual within its Disclosure Team had used their judgement to suggest contacting the MOJ's Records Management Team. The MOJ explained

that it is unusual to contact the Records Management team without first having more information, as a transferred file would not necessarily go directly to this team. As previously stated, such a file could go to any area of the MOJ or to one of its executive agencies.

27. The MOJ has explained that the requested file was:

"...reviewed as part of the annual review of policy files in compliance with the Public Records Act. Staff in the Departmental Library and Records Management Service (DLRMS) review policy files against criteria set out by the National Archives (TNA). These criteria inform the selection of records for permanent preservation. Once reviewed, DLRMS submits its proposals for the records which should be preserved, or destroyed to TNA. Once these proposals are agreed, records are securely destroyed that are deemed of no further interest to the public record. This process used to happen when a record was 30 years old, however following changes introduced by The Public Records (Transfer to the Public Record Office) (Transitional and Saving Provisions) Order 2012 this is now being transitioned to a 20-year rule. TNA produces a table showing the years in which records will ideally be transferred as part of this process. Records created in 1992, including PN92 0004/0301/006 should have been transferred or destroyed in 2017. However due to delays within TNA this file was not destroyed until 2018".

28. The MOJ has also provided the Commissioner with the relevant extract from the Records Management team destruction schedule (labelled by it as 'Annex C'– see next paragraph) which shows the requested file was destroyed 9 February 2018.

29. In addition, the MOJ told the Commissioner that:

"There is no business purpose for which the requested information should remain to be held and no statutory requirements to retain the file. The Public Records Act requires the MOJ to destroy information that is not selected for permanent preservation. Records retention and disposition schedules are used to comply with this legislation (annex D [copy provided to the Commissioner]). This file was not covered by the moratorium relating to the independent inquiry on child sexual abuse. All records are checked for relevant content as part of the review process and recorded in the spreadsheet (annex C [copy provided to the Commissioner])."

30. Further, the MOJ said:

"It should be noted that if DLRMS staff had been aware that this record was the subject of an FoI request, it would have been retained until the request had been answered. Once the FoI request had been completed, the record would then have been subject to the review and destruction process outlined above. In MOJ HQ, registered files have been phased out as digital records become the norm. Many staff have not seen a file so would not recognise the type of number that was used in the request. However, the Disclosure Team and DLRMS have been building up knowledge of each other's work including seconding staff and job shadowing. It is hoped this will minimise the chances of a similar situation occurring."

31. Having considered the evidence before her from both parties, the Commissioner is satisfied that the requested file was transferred by the Home Office to the MOJ in 2016 and has since destroyed by the MOJ in accordance with the relevant retention schedule. It is a moot point given that the file has been destroyed; however, it is not for the Commissioner to determine whether such a file, if still in existence, would be caught by the moratorium relating to the child sexual abuse independent inquiry as this falls outside her FOIA remit.
32. The Commissioner is mindful of the complainant's view that the file has been intentionally destroyed; however the file was held by the MOJ at the time of his initial request (26 May 2017) and whilst the Commissioner cannot speculate about how a clarified request would have been handled by the MOJ, she has no reason to doubt that the file would have been provided (subject to any FOIA exemptions which may have been applicable) had the complainant given further details to assist the MOJ in locating it at that time. Further, she notes that the file should have been destroyed in 2017 but its destruction did not take place until February 2018 due to delays within TNA. The complainant (or indeed any other requester) could have submitted an FOIA request at any point following its transfer to the MOJ and prior to its destruction.
33. The Commissioner considers the MOJ's explanation of its handling of both the complainant's requests and the history of the requested file to be reasonable. It is worth noting that there was a period of over eight months between the date of the initial request in May 2017 and the destruction of the requested file in February 2018. If the MOJ had intended to destroy the file to prevent it being seen as the complainant has contended, then it makes little sense that the file was held by the MOJ from November 2016 until February 2018. Further, there is no obvious link between the timing of the initial request (May 2017), the file's destruction (February 2018) and the date of the complainant's

second request (June 2018) that would suggest that the file has been intentionally destroyed for any other reasons than the MOJ has explained.

Conclusion

34. From the information provided, the Commissioner has concluded, on the balance of probabilities, that the MOJ does not hold the requested information.

Right of appeal

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

Website: 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
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