

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2023

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

Decision (including any steps ordered)

1. The complainant made two closely linked requests for information (as set out in this notice) relating to particular tribunal hearings over a specified time period. All parties agreed that the two requests should be considered together due to their similar and partially overlapping nature. The Ministry of Justice (the 'MOJ') responded in full to both requests. It was able to provide some of the information and initially said it did not hold the remainder. Ultimately, the MOJ revised its position and wished to rely on section 12(2) of FOIA – the 'neither confirm nor deny' provision within the cost exclusion.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 12(2) for both requests. It also met its section 16 of FOIA advice and assistance obligations. However, by failing to respond to both requests within the statutory timeframe of 20 working days, the MOJ has breached section 10(1) of FOIA.
3. No steps are required as a result of this notice.

Requests and responses

Request 1

4. On 27 July 2022, the complainant wrote to the MOJ and requested information in the following terms:

"For London Central Employment Tribunal

1. During 31 December 2020-28 February 2021 were any hearings listed for an in person full merits hearing? If so,

please can you give the number of hearings and the venues used by the London central tribunal.

2. Please also include the length of those full merit hearings hearings [sic] as per answer to Q1.
3. Please list the number any [sic] in person full merits hearings during this period that were heard for 20 days and longer.
4. I would also like to know the figures for any hearings (full merits) that were listed in this period and were heard (via CVP [Cloud Video Platform] and person so should be split) with a hearing length of:
 1. 10 days
 2. 12 days
 3. 15 days
 4. 20 days
5. I would also like to know [sic] number of cases listed for a full merits hearing, how many were postponed and what percentage this represented of cases that were due to be heard for full merits hearing from 4 January 2021-1 February 2021. Also, of the ones that went ahead how many were in person, and then via CVP remotely. Please also confirm if there were any additional delays more than 1 day for those hearings that did go ahead."
5. The MOJ responded, late, on 31 August 2022 as follows:
 - " 1. I can confirm that no hearings were held in-person during this period. London Central was not present in its building for that period due to COVID related reasons. All hearings were held via Cloud Video Platform (CVP).
 2. I can confirm that no in-person hearings were held.
 3. I can confirm that no in-person hearings were held.
 4. I can confirm that no in-person hearings were held. With regards to CVP hearings, 3 hearings ran for 10 days and 1 hearing ran for 15 days.
 5. I can confirm that we do not hold this information."
6. On 31 August 2022, the complainant requested an internal review in relation to parts 1 and 5 of her request. The MOJ provided its internal

review result, late, on 28 October 2022. It stated that her question about alternative venues for part 1 of her request had been addressed under another request she had submitted. For part 5, the MOJ revised its position and said the response should have been "nil" as no full-merit hearings had taken place during the specified period.

Request 2

7. The complainant made her second linked request to the MOJ on 4 September 2022 as follows:

"Please can you provide the FOIA information for the London Central Employment Tribunal.

1. During January 4th 2021- 28 February 2021 please detail the number of cases listed for final hearing?
2. During the period listed above in Q1, how many hearings were postponed/vacated?
3. During the period listed above in Q1, please confirm the number of hearings postponed that were not deemed suitable for a CVP remote hearing due to the pandemic?
4. During the period listed at Q1, please confirm the reporting requirements of the London Central Employment Tribunal on statistics of hearings postponed etc and where this goes to?
5. During the period listed in Q1, for the final hearing that did take place, please confirm the lengths of all the hearings and the dates they were heard. The parties should be confirmed given this is publicly available information.
6. Please confirm the reason why the final hearing on 13 January 2021 listed for 20 days at London Central Employment Tribunal was postponed.
7. Further to Q6 please provide the name of the parties for the hearing that I understand was re-listed in June."

Scope of the case

8. The complainant initially contacted the Commissioner in relation to Request 1 on 10 August 2022 to complain about the way her request for information had been handled. On 4 October 2022, she contacted the Commissioner again, this time about Request 2 as the MOJ had not, at that point, provided its response.

9. The Commissioner wrote to the MOJ about the then overdue response for Request 2 which the MOJ subsequently provided, late, on 10 October 2022. It said it did not hold the requested information for parts 1-4 of the complainant's request. For part 5, the MOJ explained that accurate information is not held due to the closure of its tribunal building during this part of the pandemic and its staff having limited access to its IT database, although recovery work has since been carried out. Based on the records, which it cannot state are accurate, the MOJ said that three CVP hearings ran for ten days and one CVP hearing for 15 days. The MOJ stated that it considered part 6 was not a valid request for recorded information under FOIA and advised that the relevant case number would need to be provided in order for it to respond to part 7 of the request.
10. On 14 October 2022, the Commissioner advised the complainant to request an internal review in relation to Request 2 as she had confirmed she was dissatisfied with the response.
11. The Commissioner commenced his consideration of Request 1 on 6 December 2022 and noted that the only complaint on the case related to Request 2. He contacted the complainant for clarification of her grounds of complaint, which were provided in full by 29 December 2022 and included the following:
 - Concern with the delays in providing the responses.
 - Issues with the MOJ not being able to provide the total number of hearings and total number of postponements.
 - Her view that as the MOJ is obligated to publish certain data relating to hearings the requested information must be available.¹
12. It is useful to briefly set out here the MOJ's view of the above concerns from the complainant:
 - The MOJ acknowledged the delays in this case and apologised to the complainant.
 - The MOJ said it is not required to keep records of hearing postponements and does not hold this information. The MOJ stated it is unable to provide the total number of hearings for the reasons set out later in this notice. It explained that as there

¹ <https://www.courtserve.net/services/tribunal-express/employment-tribunal-landing-page.php>

were so few CVP hearings of over ten days duration, it was able to conduct a manual count and provide this as part of its response.

- The MOJ advised that its IT database holds the following records:
 - Number of cases disposed of;
 - Average timeline of a case from start to finish;
 - Current size of caseload;
 - Time for service of a new claim;
 - Costs and awards data;
 - Hearing type;
 - Judicial output, Salaried/Fee paid
 - The MOJ confirmed that its IT database will not show postponements and hearings converted, both of which the complainant is interested in, because it is not set up to record this information.
 - The Tribunal confirmed that the cause lists (daily lists of hearings) were not published for the period 4 January 2021 to 1 February 2021 (the period cited for part 5 of Request 1) due to the disruptions covering this period.
13. It was subsequently agreed by all parties that Requests 1 and 2 would be considered together, given the first request had led to the second and were on the same subject matter.
14. Over the next several weeks, there followed an exchange of correspondence between the complainant and the MOJ (facilitated by the Commissioner) with a view to resolving both complaints informally.
15. The complainant raised various queries, all of which were responded to by the MOJ and she also put forward her view of certain aspects. Sometimes her assumptions have been incorrect - for example the complainant believes there would only have been 25 to 30 final hearings cases during the time period in her request - however, the MOJ has advised that there will have been in the region of 600 final hearings listed. She also believes there will only have been ten judges involved during the period she is interested in; however the MOJ has stated that there were around 20 full time judges and 40 fee paid judges during this time.
16. On 13 March 2023, the MOJ wrote to the Commissioner advising it wished to revise its position. Whilst responding to the further queries raised by the complainant, it said it now wished to rely on the 'neither confirm nor deny' ('NCND') provision within the section 12(2) cost exclusion of FOIA, which it advised applies to "most of the information"

requested. The MOJ wrote to the complainant on 30 March 2023 to inform her of its revised stance.

17. It should be noted that, where a public authority relies on section 12(2) of FOIA for any part of a request, it is not obligated to respond to any remaining parts if they are part of an overarching theme.
18. On 4 April 2023, the Commissioner spoke to the complainant, at her request, about the MOJ's revised stance. He then relayed her concerns to the MOJ prior to reaching his decision in this case. It became apparent that this case would not be one that could be informally resolved so the Commissioner necessarily proceeded to a formal decision notice.
19. The Commissioner has considered whether the MOJ was entitled to rely on section 12(2) to refuse the requests.

Reasons for decision

Section 12 – cost of compliance exceeds appropriate limit

Aggregation of requests

20. Multiple questions within a single item of correspondence are considered to be separate requests for the purpose of section 12. In the present case, this means that there are several requests to be considered. However, where requests relate to the same overarching theme, a public authority may aggregate two or more separate requests in accordance with the conditions laid out in the Fees Regulations², provided those requests are received by the public authority within any period of sixty consecutive working days. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.
21. In the Commissioner's guidance³ on exceeding the cost limits, he explains that:

"Regulation 5(2) of the Fees Regulations requires that the requests which are aggregated relate "to any extent" to the same or similar

² <https://www.legislation.gov.uk/uksi/2004/3244/regulation/3/made>

³ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

information. This is quite a wide test but public authorities should still ensure that the requests meet this requirement.

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”.

22. The Fees Regulations wording of “**relate, to any extent, to the same or similar information**” makes clear that the requested information does not need to be closely linked to be aggregated, only that the requests can be linked.
23. Although the MOJ did not address this point, having reviewed the wording of the complainant’s requests, the Commissioner is satisfied that there is an overarching theme. This is because the individual questions all refer to information about tribunal hearings. Therefore, the MOJ was entitled to aggregate the costs of dealing with each question.
24. The reasoning below examines whether the MOJ is entitled to rely on section 12(2) of FOIA to refuse to provide the requested information.
25. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the “appropriate limit” as set out in the Fees Regulations This limit is £600 for a central government department such as the MOJ.
26. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
27. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, effectively imposing a time limit of 24 hours for the MOJ.
28. Where section 12(2) is relied upon, Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following activity:
 - determining whether the information is held.
29. The MOJ has explained that the usual process relating to hearings, and how information was recorded prior to the period specified by the complainant, would have been to use the its former ETHOS IT database, and to cross check against an Excel diary. However, the MOJ advised that the two never exactly match partly due to a time lag and

sometimes as a result of human error, but it said that further cross checking gives a more conclusive outcome. By doing such a check the MOJ would be able to conclude what hearings had been originally listed and which had actually occurred. However, it said that this process would not give figures of postponed cases, or show if a type of hearing had been changed, because the MOJ does not record postponement figures or details of cases being converted by type ie from full hearing to CPH (Closed Preliminary Hearing).

30. The MOJ added that it would have been able to obtain such information by looking at cases that were heard, and checking for changes of listing on the IT database. However, it said that as completing this task would exceed the cost limit there is no requirement for the MOJ to do this.
31. All the hearings which took place during the specified time period were heard via CVP. Manual lists were created for cases to be heard which, due to the ways in which the MOJ was having to work at that time as a result of the pandemic, were not necessarily accurate.
32. The MOJ also explained that it could not use its central inbox (a general inbox that receives emails from its users) during this time and that an automated response was sent to anyone sending emails to that inbox to inform them of this.
33. During the relevant period mentioned, the MOJ explained that a very small number of MOJ staff were able to work remotely due to three main reasons:
 - Due to COVID guidelines a very limited space was made available at a remote office for a small number of staff to work from. This number increased as more desks were made available but for a large part of this period London Central was operating with fewer staff.
 - During the mentioned period a very small number of staff had sufficient IT equipment to enable home working. This increased as the period evolved, but the effects were significant.
 - The MOJ also provided some additional information about its database in confidence, which the Commissioner has taken into consideration.
34. During the course of the Commissioner's investigation, the complainant suggested that the MOJ could 'tally up' the emails to locate the requested information. In its response to the Commissioner, the MOJ said:

"The MOJ note the comment in relation to counting emails and there are several reasons why this is not feasible. The first is that

the MOJ did not have functionality for emails to be sent from a central address. Therefore, we would need to check personal email accounts from all staff involved, many of whom we have been informed are no longer working for HMCTS [now His Majesty's Courts and Tribunals Service]. Secondly, the MOJ could look to check emails that were sent into the Tribunal during that period but would not be able to see the outcome from a received email only. Thirdly, cases were also converted, or cancelled via telephone, but the MOJ, having consulted with HMCTS London colleagues, must confirm that we do not hold any records in that area. In addition to this, many Hearings were not picked up at the time as we were not able to find all listed cases in time or via the above methods mentioned. As a result, they were considered at a much later date."

35. With regards to the process during the period specified by the complainant, the MOJ told the Commissioner that:

"In January and February 2021, Hearings were either postponed or converted as cases were discovered. This happened over a number of ways – some cases were discovered from parties writing by email to enquire what was happening with their case, some telephoned through the Central ET [Employment Tribunal] phone line and we received updates by email and on some occasions parties attended Victory House for a Hearing to be told it was not going ahead and to email the Tribunal. In addition to this, one member of staff was sent back to Victory House around twice a week to try to obtain Hearing details and Hearing information to make plans wherever possible..."

36. The MOJ also provided additional information that it requested not to be reproduced in the decision notice regarding the issues it faced in relation to hearings during the pandemic, which the Commissioner has taken into consideration.
37. Section 12(2) requires a public authority to estimate the cost of confirming or denying whether information is held, rather than formulating an exact calculation. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of "Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004", the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".
38. The MOJ estimated that there are 600 listed hearings through the requested period. It explained that this is not a case of looking at a period and collating case numbers to then check the cases/hearings; rather this is an exercise to find cases via emails, diaries, inboxes and

Judgments. The MOJ estimated that it would take a member of staff an average of two minutes per record to determine what information is held.

39. The MOJ also clarified that for those estimated 600 cases it would need to check 3000 electronic files at an estimated two minutes each, taking the total to 6000 minutes equating to a cost of £2500. It explained:

“Please note that the above figure of 3000 relates to an estimated 600 cases being checked across five digital/electronic areas and 2 mins is the estimate for each. It is not strictly electronic files as the methods for checking would entail using the following electronic methods:

- Excel diary as a guide
- Individual inboxes of remaining staff
- Central email inbox, Case management, Instructions and promulgation inboxes (four separate inboxes but from a central location)
- Judicial Skype email inboxes - used at the time as no other email system was accessible to them during the pandemic.”

40. The MOJ told the Commissioner:

“Please note this is relating to an exercise to try to find information and reconstruct previous events and details. It is not a case of looking through old records and counting or gathering. I believe that even after completing this exercise it will not include all information requested. There are many cases/hearings that will not be recorded anywhere or may have information in deleted accounts where staff members have left. Since the mentioned period, around twenty staff have left HMCTS - many of which will have been involved in email communications during that time.”

41. Based on the information provided, the Commissioner accepts that the MOJ would need to manually review all relevant records and attempt to reconstruct previous events. It is unfortunate that the records were not able to be maintained, as they normally would have been, but the Commissioner accepts that the impact of the Covid-19 pandemic forced the MOJ into adopting alternative ways of working.
42. The Commissioner considers that the two minute estimate to check five digital areas is reasonable. He accepts that, in any case, the cost limit is met due to the volume of records needed to be reviewed, and the fact that a manual review/reconstruction is required.

43. The Commissioner is therefore satisfied that the MOJ was entitled to rely on section 12(2) of FOIA to refuse the complainant's requests.

Section 16(1) - advice and assistance

44. Section 16(1) of FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section, it will be taken to have complied with its obligations.
45. The MOJ advised the complainant to consider reducing the volume of the request, whilst highlighting it could not guarantee that a refined request would fall under the FOIA cost limit or that other FOIA exemptions will not apply. The MOJ also reiterated that any refined request which results in it being able to respond would not contain completely accurate information as many of the cases were not captured during this period.
46. The Commissioner cannot see any other easy way in which the complainant's request could be responded to. The Commissioner is satisfied that there was no breach of section 16(1) of FOIA.

Section 10 – time for compliance

47. Section 1(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.”

48. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.
49. In relation to both Requests 1 and 2, the MOJ failed to provide its responses within the statutory 20 working days' timeframe. The MOJ thereby breached section 10(1) of FOIA. A record of these delays has been made by the Commissioner.

Other matters

Internal review delay

50. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
51. Part 5 of the section 45 Code of Practice⁴ (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
52. In relation to Request 1, the MOJ failed to provide its internal review until 40 working days after the date of receipt. It did not notify the complainant that it considered the review to be complex or voluminous such that it would require more time than the recommended 20 working days. The Commissioner finds that the MOJ erred in failing to provide its internal review within the recommended timeframe and has made a record of this.
53. For both the response and internal review delays, the Commissioner will record the delays as intelligence to inform his insight and compliance function. This will align with the goal in his draft "Openness by Design strategy"⁵ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

References: IC-185749-F9H9 and IC-194909-W3G4



compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual.⁶

⁶ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

54. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.

56. 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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