

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 October 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant requested a copy of an original will. The Ministry of Justice (MoJ) denied holding the requested information.
2. The Commissioner's decision is that the MoJ does not hold the requested information for the purposes of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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4. On 20 May 2023, the complainant wrote to HM Courts and Tribunals Service [HMCTS] and requested information in the following terms:

"Please provide me with a copy of the original will for [name redacted] as identified in the National Probate Calendar as follows:

[...]

To confirm, I would like a copy of the original will that contains the original signatures of the testator and the witnesses. I already have a copy of the registered will, [...] which I have obtained from the Probate Search Service website at:

<https://probatesearch.service.gov.uk/>

The original will is a different document to the registered copy and will contain original signatures.”

5. The request was made using 'whatdotheyknow'.
6. The MoJ responded on 8 June 2023. It stated that the application for wills does not fall under the FOIA process and as such it cannot provide assistance directly. It did, however, advise where it may be possible to obtain some of the requested information from, namely the probate registry.
7. Following an internal review, the MoJ wrote to the complainant on 21 June 2023, revising its position. While stating that it does not hold the requested information, it confirmed that the signposting it provided to the service that can assist was correct.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way their request for information had been handled, noting what they consider to be contradictory responses provided by the MoJ. They told the Commissioner:

“The main issue here is does the MoJ/HMCTS hold the information requested”.
9. The Commissioner accepts that the complainant addressed their request for information to “Dear HM Courts and Tribunals Service”.
10. HMCTS is not listed as a public authority in schedule 1 to FOIA. However, HMCTS is an executive agency of the MoJ and falls within its remit for the purposes of FOIA. MoJ is therefore the appropriate public authority in this case.
11. The analysis below considers whether the MoJ holds the requested information for the purposes of FOIA.

## Reasons for decision

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### Section 1 general right of access to information held by public authorities

12. Section 1 of FOIA states:

“(1) 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.”

13. These rights only apply to the **information** a public authority holds. This means there is no explicit right to copies of original documents.

### **Section 3(2) – information held by a public authority**

14. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of FOIA:

“For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

15. This sets out a two part definition. Information is held by the public authority, and therefore within scope of a FOIA request, if the authority holds it (but not if it holds it only on behalf of another person), or if another person holds it on behalf of the authority.

16. The Commissioner’s guidance<sup>1</sup> ‘Information you hold for the purposes of FOIA’ explains the circumstances in which information is considered to be held by a public authority for the purposes of FOIA.

17. His guidance also makes it clear that whether information is held by a public authority, or is held on behalf of a public authority, depends on the facts of the case.

### **The complainant’s view**

18. The complainant considers that the MoJ and HMCTS are incorrect when they state that the MoJ does not hold any information in scope of the request.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/>

19. In support of this view, the complainant referred the Commissioner to the MoJ's Records Retention and Disposition Schedules. The complainant also referred to the Supreme Court Act 1981 (SCA).
20. With respect to the MoJ's signposting to the probate service, the complainant told the MoJ that they believe that the probate registry is part of HMCTS and therefore the information is held by HMCTS.
21. Similarly, they told the Commissioner that it should not make a difference if they request the information via a FOI request to HMCTS or via a district probate registry.

### **The MoJ's position**

22. In its submission to the Commissioner, the MoJ acknowledged that the probate registry is part of HMCTS. It said:

"[The probate registry] issues legal documents which give people the authority to deal with the estate of someone who has died. HM Courts and Tribunals Service is responsible for the administration (for the judiciary) of criminal, civil and family courts and tribunals in England and Wales".

23. It also explained:

"HMCTS functions in more than one capacity, one as a court officer when conducting business for the court (under the direction of the court), and the other as a public authority, (such as reporting and analytics of court services). Even though HMCTS holds information, it does not necessarily mean it is always held under in a public authority capacity".

24. In the context of this case, the MoJ told the Commissioner:

"Courts are not public authorities for the purposes of the FOIA. As such, information held by the courts, or held by a public authority on behalf of a court, is not within the scope of the Act".

25. Acknowledging the nature of the requested information in this case, the MoJ explained that, while HMCTS may hold information of the type requested, it is held by HMCTS as a court officer (under the direction of the court), not in its public authority capacity. Therefore, the information requested is not held for the purposes of FOIA.
26. Similarly, it explained that wills are held in storage by a third-party contractor on behalf of HMCTS as a court officer, not in a public authority capacity. It told the Commissioner that the process for dealing with requests for wills from deep storage sits with the probate registries.

## **The Commissioner's view**

27. It is not in dispute that the MoJ is a public authority for the purposes of FOIA. It is also well established that courts and inquiries are not subject to FOIA, as is recognised by the Commissioner in his guidance<sup>2</sup>.
28. The Commissioner acknowledges that the MoJ's position is that FOIA only applies to the information held by public authorities for their public authority functions: it does not apply to courts and tribunals. As such, information held by the courts, or held by a public authority on behalf of a court, is not within the scope of the Act.
29. The Commissioner understands that the complainant considers it contradictory to be told by the MoJ that it does not hold the requested information, while it also advises that the Principal Probate Registry, part of HMCTS, is responsible for wills and that the complainant can request the information they are seeking by contacting one of the probate registries.
30. He accepts the notion that, although the MoJ physically holds information of the nature requested, it does not hold this information for the purposes of the Act, is a difficult concept.
31. However, from the evidence he has seen, the Commissioner is satisfied that the requested information is held by HMCTS in the course of exercising its function as a court rather than in its capacity as a public authority. It follows that he is satisfied that it is not held by the MoJ for the purposes of FOIA.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

## Right of appeal

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32. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.

34. 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 .....**

**Gerrard Tracey  
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