

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2024

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information about the handling of a complaint made to a particular court, and associated procedural information. The Ministry of Justice ("MoJ") said that it did not hold the requested information.
2. The Commissioner's decision regarding the first part of the request is that the MoJ does not hold the requested information for the purposes of FOIA, in accordance with the definition at section 3(2) of FOIA. For the second part of the request, he has decided that, on the balance of probabilities, the MoJ does not hold the requested information.
3. The Commissioner does not require further steps as a result of this decision.

Request and response

4. On 18 April 2024, referring to a particular appeal application to Leeds Administrative Court, the complainant wrote to the MoJ and requested information in the following terms (numbering added by the Commissioner):

"(1) Produce paperwork showing that the application was issued on the dates claimed and produced [sic] paperwork from the court lawyer

to confirm that relevant work was done on the application in December. I make this request on the freedom [sic] information laws for which there is 28 [sic] day response time.

- (2) Please produce a copy of any internal procedures that outline how applications and cases are sent to judiciary. Again I make this request under freedom of information laws”.
5. The MoJ responded on 13 May 2024. As regards the first part of the request ('request (1)'), it said that it did not hold the specified information because such information was not held for the 'public authority' purposes of HM Courts & Tribunals Service (HMCTS) and the MoJ. It said such information could only be obtained by accessing the court records themselves, which are held in the custody of the court in question, for the purposes of the court only. It said that the requested information was, therefore, not held by the MoJ for the purposes of FOIA.
 6. As regards the second part of the request ('request (2)'), the MoJ asked for clarification as to whether the complainant was referring to cases being listed, or referred on an ex-parte basis on paperwork.
 7. The complainant requested an internal review on 17 May 2024, in which he also clarified the meaning of request (2).
 8. The MoJ provided the internal review outcome on 25 June 2024. It maintained its 'not held' position in respect of request (1) and it provided some information on how to go about applying for information directly from courts. As regards request (2), it said that it did not hold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 26 June 2024 to complain about the way his request for information had been handled. He disagreed with the MoJ's position that it did not hold the requested information. He also alleged that it had committed an offence under section 77 of FOIA, by deliberately concealing information in response to his request.
10. The Commissioner's Criminal Investigations Team has considered that allegation and determined that there is insufficient evidence to support it. The complainant has been notified of this, albeit the Commissioner acknowledges that he disagrees with the decision.

11. The analysis below considers whether the MoJ holds information of the description specified in request (1), for the purposes of FOIA (section 3(2) of FOIA). For request (2), the Commissioner has considered whether, on the balance of probabilities, the MoJ holds the specified information (section 1(1) of FOIA).

Reasons for decision

Request (1) (copies of paperwork on the appeal application)

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.”

Section 3(2) – Information held by a public authority

13. Section 3(2) of FOIA sets out the circumstances in which information is considered to be ‘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.”

14. 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.

15. The Commissioner's guidance 'Information you hold for the purposes of FOIA'¹ explains the circumstances in which information is considered to be held by a public authority for the purposes of FOIA.
16. The guidance also makes it clear that whether information is held by, or on behalf of, a public authority, depends on the facts of the case.

The complainant's position

17. The complainant disagrees with the MoJ's position that it does not hold the information specified in request (1). He argued that the courts are part of the MoJ and therefore would be able to access the requested information. He referred the Commissioner to information he obtained from the Judicial Conduct Investigation Office ('JCIO') which suggested to him that the MoJ did hold the requested information.

The MoJ's position

18. HMCTS is responsible for the administration (for the judiciary) of criminal, civil and family courts and tribunals in England and Wales. HMCTS is an executive agency, sponsored by the MoJ. The MoJ is responsible for responding to FOIA requests made to HMCTS (and by extension, to individual courts) under its public authority capacity.
19. In its submission to the Commissioner, the MoJ explained that HMCTS functions in more than one capacity: as a court officer, when conducting business for the court (under the direction of the court), and as a public authority (such as reporting and analytics of court and tribunal services). It said that HMCTS held information of the type requested in this case in its capacity as a court officer, and not in its public authority capacity. Therefore, the information requested is not held by it for the purposes of FOIA.
20. The MoJ further elaborated to the Commissioner as follows:

“...any information held by the Court is not held by the MOJ in its public authority function. The FOIA only applies to the information held by public authorities for their public authority functions, it does not apply to Courts and Tribunals. The MOJ maintains the FOIA does not apply to any information held by the courts not for purpose [sic] of the public

¹ <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/>

authority function. 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 FOIA. This do not hold information stance, of HMCTS and MOJ not holding information for the purpose of the FOIA, if it is not held for our public authority's functions, has been supported by the ICO in several ICO cases concerning MOJ and HMCTS, such as the following: IC-253754-Y8V8², IC-242885-P6K8³, IC-248371-V6C1⁴ and IC-263625-H1J2⁵.

As the MOJ argued in those similar FOIA cases, our stance remains that...HMCTS and the MOJ do not hold any information within the scope of this specific request within its capacity as a public authority. The information that has been requested is not held for the public authority purposes of HMCTS and MOJ, and if held, it can only be obtained by accessing the case records themselves, which are held in the custody of the court for the purposes of the court only. It is therefore not held for purpose [sic] of the FOIA and thus does not have to be disclosed under the FOIA."

21. The MoJ also confirmed that searches of electronic systems were undertaken for any information falling in scope, other than for information held in court records, and no such information was located.

The Commissioner's decision

22. 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 guidance⁶ on court records and in the decision notices cited by the MoJ.
23. 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. For this

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027371/ic-253754-y8v8.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027517/ic-242885-p6k8.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027224/ic-248371-v6c1.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027225/ic-263625-h1j2.pdf>

⁶ <https://ico.org.uk/media/for-organisations/documents/2021/2619028/s32-court-inquiry-and-arbitration-records.pdf>

reason, information held by the courts, or held by a public authority on behalf of a court, is not within the scope of FOIA.

24. As regards the information the complainant received from the JCIO, the Commissioner notes that it is not the same as the information that he specified in the request. Furthermore, the Commissioner notes that the JCIO obtained it by approaching the court in question and asking about the matter, following his complaint to it. This is in keeping with the MoJ's position that information of the type requested would be held only in court records, by the court.
25. The Commissioner understands that the complainant may consider it contradictory to be told by the MoJ that it does not hold the requested information, while it also advises that courts, part of HMCTS, are responsible for enquiries about specific cases and that the complainant can apply for the information he is seeking by contacting the relevant court and following their specific access procedures. Whether or not that request is granted is outside of the Commissioner's jurisdiction.
26. He accepts the notion that, although the MoJ may physically hold information of the type requested, it does not hold this information for the purposes of FOIA, is a difficult concept.
27. However, from the evidence he has seen, and in accordance with his published guidance and previous decisions on similar requests, 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.

Request (2) (copy of internal procedures on how applications and cases are sent to judiciary)

28. As stated above, section 1(1)(a) of FOIA states that anyone making a request for information is entitled to be told whether a public authority holds the requested information. Section 1(1)(b) requires that, if held, the information be communicated to the applicant (subject to certain non-disclosure exemptions).
29. In this case, the MoJ says that it does not hold the information described in request (2).
30. Where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner applies the civil standard of 'the balance of probabilities'.

31. This means the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request. In deciding where the balance of probabilities lies, the Commissioner will consider the evidence and arguments of both parties, as well as any other pertinent information.
32. The issue for the Commissioner to consider here is whether the requested information **is** held by the MoJ. It is not whether it **should be** held by the MoJ. On this point, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085), that 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".
33. The complainant has not offered any evidence which indicates that the MoJ does hold the information he has asked for.
34. The MoJ told the Commissioner that enquiries were made of Leeds Administrative Court to identify if guidance notes, or notes on internal procedures about ex parte referrals to judges, exist. The court had confirmed that it does not use guidance notes for this particular area of work (ie referral to judiciary) and furthermore that such guidance notes do not exist. Nevertheless, searches were also made of shared drives to check this and no information falling within scope was located.
35. Based on this information, a 'not held' response was provided to the request.
36. The Commissioner considers that this is a cogent explanation for why the MoJ says it does not hold the requested information. The court would have the requisite knowledge regarding whether such procedural guidance exists and it has confirmed that it does not. Follow up searches have confirmed that no other procedural information exists, there is no business reason why the MoJ would hold that information, and the MoJ has confirmed that it does not hold it.
37. In light of the MoJ's submissions, and the lack of any evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, the MoJ does not hold the information described in request (2).

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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