

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2019

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested all contacts between a named QC and other named Crown Prosecution Service ('CPS') officers between two specified dates, and also referenced a particular individual's case. Following clarification of the request, the CPS responded and refused to confirm or deny whether the requested information was held, citing section 40(5), the 'neither confirm nor deny' provision for personal information. During the course of the Commissioner's investigation, the CPS revised its position and cited section 12(1), the cost of compliance, for some of the request, although it maintained that section 40(5) applied to the remainder. Subsequently, it advised that it wished to aggregate all four parts of the request and cited section 12(2).
2. The Commissioner's decision is that the CPS was entitled to aggregate all parts of the request and to rely on section 12(2) to neither confirm nor deny whether it held the requested information. She also finds that it complied with its section 16 advice and assistance obligations. She does not require the CPS to take any steps as a result of this notice.

Request and response

3. On 13 March 2018 the complainant wrote to the CPS and requested information in the following terms (numbers added by the Commissioner for reference purposes):
 - "1. I write in order to lodge an official request under the Freedom of Information Act 2000 for all records pertaining to all contacts between the Crown Prosecution Service (CPS) and [name redacted] QC between the period of

November 2014 and November 2016.

2. *This includes telephone calls, e-mails, letters, text messages and all other forms of communication.*
 3. *I am especially keen to know whether [name redacted] QC, or any agent on his behalf, directly contacted [various CPS individuals' names redacted] or for that matter, [name redacted] herself, in this period.*
 4. *I am particularly interested to know whether [the named QC] contacted any of the above named individuals or any other member of the CPS in relation to the case of Regina v [name redacted] in the aforementioned period."*
4. The CPS asked the complainant to provide more detail about the case cited in his request. On 22 March 2018, the complainant provided the following clarification:
- "In answer to your enquiry, the case in question was R v [name redacted] (CPS Ref: [redacted]) which was not prosecuted by the CPS on the basis of insufficient evidence, despite a MPS recommendation to do so.*
- Although, I would point out that the main objective of the FOI request, which I submitted to your offices, was in relation to any and every contact between [the named QC] and the listed members of CPS staff between November 2014 and November 2016.*
- The point regarding the case of R v [name redacted] was a supplementary one. If there is a problem processing that part of the FOI request, then I would ask you to forge ahead and process the main request relating to the aforementioned communications between [the named QC] and the listed individuals between the said time period."*
5. The CPS responded on 28 March 2018 and refused to confirm or deny whether it held the requested information, citing section 40(5) of the FOIA (personal information).
 6. The complainant requested an internal review on 16 April 2018.

Scope of the case

7. The complainant contacted the Commissioner on 29 May 2018 to complain about the way his request for information had been handled. His initial complaint related to the outstanding internal review result.
8. The Commissioner wrote to the CPS to ask it to carry out an internal review; it advised that it had not received the complainant's review request. It subsequently provided its internal review result on 28 June 2018, in which it maintained that section 40(5) applied. The complainant contacted the Commissioner again, that same day, expressing dissatisfaction with the review.
9. During the course of the Commissioner's investigation, the CPS initially continued to rely on section 40(5) of FOIA. However, in February 2019, it revised its position and advised the Commissioner that it now wished to rely on section 12(1) (cost of compliance) for the first three parts of the request.
10. Accordingly, on 6 March 2019 the CPS wrote to the complainant to confirm its revised position in relation to section 12(1). It offered the complainant advice and assistance, in accordance with section 16 of FOIA, as to how he might wish to refine his request with a view to bringing it within the cost limit. It also maintained that section 40(5) applied to part four.
11. The complainant declined to refine his request as he did not agree that section 12(1) was engaged and instead requested a further internal review. The CPS provided this on 26 March 2019, in which it maintained that section 12(1) applied to the first three parts of the request.
12. Given that there have been two internal reviews in this case, the Commissioner contacted the complainant to ask whether he wished to complain about the CPS' reliance on section 12(1) only or its reliance on both sections 12(1) and 40(5). He replied and said that he considered this should be the Commissioner's decision.
13. During the Commissioner's investigation, the CPS subsequently revised its position again. It advised the Commissioner that it wished to aggregate all four parts of the request under section 12(4) because they related to "an overarching theme", thereby removing reliance on section 40(5). It also advised that it wished to rely on section 12(2) for the entire request, rather than 12(1).
14. The Commissioner has exercised her discretion in this case to proceed with her investigation without the complainant being updated regarding this further change in position. Given that he did not previously accept that section 12(1) was engaged, the Commissioner does not consider

that he will be disadvantaged by this approach and it will avoid any further delay to her investigation.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

15. Section 12 of FOIA states that:

"(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."

16. Section 12(1) of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

17. 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. 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.

18. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') set the appropriate limit at £600 for the CPS; they also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that the appropriate limit for the CPS equates to 24 hours.

19. 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:

- a. determining whether it holds the information;
- b. locating the information, or a document containing it;
- c. retrieving the information, or a document containing it; and

d. extracting the information from a document containing it.

20. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate by the CPS was reasonable. If it was, then section 12(2) was engaged and the CPS was not obliged to confirm or deny whether the requested information was held.

Aggregation of requests

21. Multiple requests within a single item of correspondence are considered to be separate requests for the purpose of section 12. In this case that means that there are four parts to be considered.
22. If they relate to the same overarching theme, public authorities can aggregate two or more separate requests in accordance with the conditions laid out in the Fees Regulations. Any unrelated requests should be dealt with separately for the purposes of determining whether the appropriate limit is exceeded.
23. According to the Commissioner's guidance¹:

"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.

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".

24. Regarding its consideration of the request, the CPS explained to the Commissioner:

"The CPS has considered [the complainant]'s request again and confirm that within [the complainant]'s request there is an overarching theme which is as follows:

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

- *All communications between [the named QC] and CPS employees.*
 - *All communication between [the named QC] and 9 individuals*
 - *All communication between [the named QC] in the case of R v [name redacted]."*
25. The Commissioner must now consider whether these requests relate, to any extent, to the same or similar information. The Commissioner's view on aggregating requests can be found in her guidance on requests where the cost of compliance exceeds the appropriate limit. Paragraphs 44 and 45 state:
- "Regulation 5(2) of the Fees Regulations requires that the requests which are 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.*
- 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."*
26. 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.
27. Having reviewed the wording of the complainant's request, the Commissioner is satisfied that there is an overarching theme in that all parts refer to information directly relating to a named QC's communications. The Commissioner, therefore, finds that the CPS was entitled to rely on section 12(4) of FOIA to aggregate all four parts of the request under consideration here.

Application of section 12(2)

28. The CPS told the Commissioner that it employs over 6000 employees and that to provide a response to the first part of the complainant's request (all records pertaining to all contacts between the CPS and [name redacted] QC between the time period specified and in relation to the forms of communications), would require the CPS Information Management Unit ('IMU') to contact all 6000 employees who would then be required to conduct an individual search of their personal mailbox, shared drives, case management systems, hard copy files and possibly any work phones.

29. Below is CPS' detailed estimate of the time and cost taken to provide the information falling within the scope of the FOI request:

- (a) The estimated time for the 6000 employees to manually review equates as follows:

6000 (CPS Employees) x 0.25 hour per Employee
= 1500 hours
= 210 working days*
(* 1 working day = 7 hours and 12 minutes)

- (b) The estimated cost to manually review the 6000 Employees
= 1500 hours x £25 flat rate per hour
= £37,500

30. The CPS said, therefore, that it would only be able to contact around 200 employees before triggering the section 12 exemption.

31. The CPS explained that, due to the wide range of the scope of the complainant's request, a sampling exercise was not undertaken. It highlighted that the most effective way to extract the required information was to conduct the searches with the nine individuals listed and narrow the scope of the correspondence search in the original request, but noted that the complainant was not content with this and would not narrow the scope of his request.

32. The complainant contended that:

"It would surely only be necessary to search the CPS computerised databases using the appropriate parameter. I would point out that the only search parameter required is the name of [name redacted] QC."

33. The Commissioner asked the CPS to confirm whether it is necessary for its IMU to request all 6000 employees to carry out a search of their personal mailbox in order to obtain the requested information. In reply, the CPS advised:

"To accurately answer [the complainant's] request the CPS would have to contact all employees within the organisation and request that they undertake a review of their system to confirm whether they hold any data within scope of the request, as within [the complainant's] request he has stated the following 'all records pertaining to all contacts between the Crown Prosecution Service (CPS) and [name redacted] QC all records'.

In the circumstances it would not be practicable for the CPS to approach all CPS employees to undertake this task as this would have a detrimental effect on the resources for the organisation."

34. The CPS has explained that each staff member has a personal mailbox specifically dedicated to them; staff members are also provided with a share drive known as 'my documents' and each of these would need to be checked. Furthermore, each prosecuting team (such as CPS' appeals unit) would hold a shared drive folder which could also hold case material.
35. The CPS advised the complainant that the configuration of its case management system 'CMS' does not have a standard searching facility. CMS only allows searches by defendants' names, dates of birth and areas, along with a unique reference number ('URN') search. The CPS said it should be noted that to conduct an 'ad-hoc' search of CMS looking for cases where the named QC was instructed by the CPS, or involved in giving expert legal advice, would involve commissioning a CGI (Computer Generated Imagery) search which would in itself engage section 12 and be cost prohibitive; this is because CMS does not record these search terms.
36. The Commissioner asked the CPS if it had checked with its IT department to see whether a search could be done utilising the search term of the named QC and within the time parameters specified by the complainant. In reply the CPS said:

"It is possible to construct scripts to search the structured data fields within our Case Management System and therefore it would be possible to commission a script from CGI to identify cases where this individual was the prosecution advocate. However, as the completion of this field is not mandated it is only used on a small proportion of cases and even when it has been used, it may only be for the first advocate instructed rather than the advocate at each hearing and therefore [named QC] name may not be picked up".

37. The CPS also explained:

"To commission the CGI an 'ad-hoc' search in the CPS Case Management System (CMS) looking for cases where [the named QC] was instructed by CPS or involved in giving expert legal opinion would be cost prohibitive, as this is not a term which would be recorded on CMS. The CPS would have to look at every single case in every single area which is recorded, then would have to go into the Comms tabs and documents to ascertain the information requested by [the complainant]. As a guide, the cases the CPS would need to manually review in order to

ascertain the possible information requested by [the complainant], during the financial year 2015-2016 the CPS completed prosecutions in respect of 637,778 defendants."

38. The Commissioner also asked whether the CPS' IT department could run a report to retrieve the requested information. The CPS advised:

"It is not possible to search the content of emails and documents held within CMS as it is not a document management system. Without the capability to search this unstructured content we do not have the means to comply with the request for all communications with this individual."

39. The CPS has confirmed that the named QC would not hold a CPS email account as he is not a CPS staff member. It said that any email address held would be his personal address, a work address provided by his chambers or the clerk's address that was appointed to him at the given time period.

40. The Commissioner asked the CPS to explain how emails dating from November 2014 to November 2016 would be retrieved. In reply, the CPS said:

"If the emails are held they would be retrieved by each CPS staff member conducting a search on their personal mailbox specifically dedicated to them as well as conducting a search under dedicated team email addresses."

41. In order to determine an accurate amount of files, boxes, documents, records or emails (ie the 'hard copy' information) which would need to be reviewed, the CPS explained that it would at first need to contact all its employees within the 14 CPS areas to obtain this information. Amongst those teams the IMU would envisage the administration teams would have to recall the physical cases back from the CPS' storage providers, then review each case to identify if the named QC provided any correspondence in relation to the case. Once material has been identified the CPS said it is possible that a reviewing lawyer would need to review the material to consider whether it is in scope of the request.

42. The Commissioner asked how the hard copy information would be identified. In reply, the CPS explained that it:

"... would firstly need to search CMS to identify the case names and the URN numbers of the possible cases which may hold the information requested, a request to our archive storage facility would be required to obtain the physical files and then a manual search of the material would need to be conducted. Our CPS areas or our Records Management department ('RMU') would

need to conduct this process. Furthermore having conducted the RMU, they have confirmed on a yearly basis they process approximately 800-1000 archive files".

43. The CPS advised that it had also contacted its finance department to ascertain whether there were any records to evidence whether the QC had been instructed during the time period outlined by the complainant. No relevant records had been identified.

Conclusion

44. The Commissioner must decide whether or not the cost estimate given by the CPS was reasonable.
45. Whilst no sampling exercise is required in the circumstances of this case, the Commissioner notes that some initial searches have been undertaken by the CPS as a way of estimating how long actual searches would take. In view of the wording of the request, she is satisfied that the work undertaken by the CPS to ascertain its estimate is adequate as it is so broad.
46. The Commissioner therefore considers this estimate to be a reasonable one. The Commissioner therefore concludes that section 12(2) is engaged and that the CPS was not obliged to confirm or deny holding any of the requested information.

Section 16 – duty to provide advice and assistance

47. Section 16 of FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as would be reasonable to expect the authority to do so, to persons to propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

48. Paragraph 14 of the section 45 Code of Practice² states:

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the 'appropriate limit' (i.e. the cost threshold) the authority should consider provide an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

49. The Commissioner's view is that, where a public authority refuses a requests under section 12(1) of FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.

50. In this case, the CPS advised the complainant as follows:

"If you were to refine the scope of your request only to the nine individuals mentioned above, as well as narrowing the time frame for example a year and the type of communication, i.e. emails only as the other communications listed in the request is far too wide for individuals to search and some of this information is unlikely to be recorded. We can take this forward as a new request, subject to any further exemptions which may apply."

Conclusion

51. Whilst noting the complainant's refusal to refine his request and his reasons for this decision, the Commissioner is satisfied that the CPS met its section 16 obligations.

Right of appeal

52. 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@justice.gov.uk

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

53. 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.
54. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF