

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2014

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested transparency data relating to a specified timeframe. The Ministry of Justice (MoJ) confirmed it held relevant data but refused to disclose it citing section 22 of FOIA (information intended for future publication).
2. The Commissioner's decision is that the MoJ incorrectly applied section 22. The Commissioner requires the public authority to disclose the information withheld under section 22 of the FOIA.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The Commissioner understands that HM Treasury (HMT) require that all central government departments publish monthly data of their spend transactions over £25k by the end of the following month.

Request and response

5. On 10 May 2013 the complainant requested information of the following description:

"Can you please provide me with £25k supplier statements for the period between Nov12- Apr 13 (6 months). As far as I am aware, this data is not available on your website.

Please provide me with the statements in a CSV/Excel format".

6. The MoJ sought clarification of the request. The complainant responded by explaining:

"MoJ usually puts the statements up on the following website, were [sic] you can see examples of statements from October 2012 and before

<https://www.gov.uk/government/publications/spend-over-25-000>

In terms of the value, I am referring to transactions over £25k".

7. Following that clarification, the MoJ responded on 14 June 2013. It refused to provide the requested information, citing the section 22(1) exemption of FOIA (information intended for future publication) as its basis for doing so.
8. The complainant requested an internal review on 14 June 2013. The MoJ sent her the outcome of its internal review on 12 July 2013. It upheld its original position. It also told her:

"At the time of your request there was a clear intention to publish the >£25,000 transparency data however an exact date could not be provided due to the internal governance review taking place. I can confirm the current aim is for publication is 31 August 2013 [sic]".

Scope of the case

9. The information having not been published by 31 August 2013, the complainant contacted the Commissioner on 2 September 2013 to complain about the way her request for information had been handled.
10. The Commissioner considers the scope of his investigation to be the MoJ's application of section 22 to the withheld information.

Reasons for decision

Section 22 information intended for future publication

11. For the exemption to be engaged, the Commissioner first needs to be satisfied that the information is held with the intention of being published, whether by the public authority or by any other person. Secondly, section 22 requires that this intention must have existed at the time of the request, and thirdly, it must be reasonable in all the circumstances that the information should be withheld from disclosure until the intended date of publication.
12. This exemption is also qualified by the public interest, meaning that the information should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Intention to publish at some future date existed at the time the request was made

13. Section 22 applies only when the information is held with a view to publication at the time the request for it was received.
14. In its correspondence of 14 June 2013, the MoJ told the complainant:

"The work to update our >£25,000 transparency data is ongoing and we will publish it in due course..."
15. Subsequently, the MoJ said that it was aiming to publish the data on 31 August 2013.
16. During the course of his investigation, the MoJ explained to the Commissioner that it was still the intention of the Department to publish information relevant to the request. It told him:

"we are committed to publishing the data shortly"
17. In this case, the Commissioner notes the MoJ's assertion that, at the time of the request, there was a clear intention to publish, albeit the exact date of publication was dependent on the completion of an internal governance review. He understands that the review is a review of processes relating to the preparation and publication of transparency data. He also accepts that transparency data relating to periods prior to the timeframe specified in the request has been published and is available on the *gov.uk* website.

Information held at the time of the request

18. The Commissioner notes the MoJ's confirmation that the information requested was held at the time of the request. On 14 June 2013 it told the complainant:

"I can confirm that the department holds information that you have asked for, but it is exempt from disclosure because it is intended for future publication".

Held with a view to publication?

19. The Commissioner interprets the words 'with a view to' in section 22 to indicate an intention has been made to publish - or at the very least that the information is held in the settled expectation that it will be published. If, during the course of the preparation of the information for publication, some material will be redacted or rejected, section 22 will not apply to that information. This is because the public authority will no longer hold the information with a view to publication in the future.
20. In the Commissioner's view, in order to engage section 22, a public authority must be able to show clearly which information within the scope of a request it intends to publish.
21. As is his practice when investigating a complaint such as this, the Commissioner asked the MoJ to provide him with a copy of the withheld information.
22. In response, rather than evidencing that it holds the material it intends to publish, the MoJ told the Commissioner:

"Unfortunately it is not possible for us to provide you with the withheld information as it is currently being finalised and reviewed in readiness for publication".

23. It also told him, albeit in respect of the public interest in maintaining the exemption:

"... it is also in the public interest that the data and statistics have been checked and verified for accuracy before they are released".

24. The MoJ told the Commissioner that the 'over £25,000 transparency data' will not be disclosed:

"until such time as the data has been fully checked and verified for any inaccuracies".

Reasonable to withhold?

25. In requesting an internal review, the complainant told the MoJ:
- "... this is a type of dataset that should be published monthly".*
26. The MoJ told the complainant it was reasonable to withhold the data until such time as its internal governance review was complete. This in turn would ensure that the publication of official information is a properly planned and managed process thus ensuring that data are accurate once placed into the public domain.
27. During the course of his investigation, the MoJ confirmed its view with respect to verifying the requested data and supporting information for accuracy and consistency prior to release.
28. It also drew the Commissioner's attention to the fact that, in the period preceding November 2012, information regarding the MoJ's 'over£25,000 spend' had been published "*broadly in line*" with HMT's deadline.

Is the exemption engaged?

29. The Commissioner's task is to consider whether information was held with an intention to disclose at the time that the request was made and whether it was reasonable to delay access to this information until the time of that publication.
30. The Commissioner acknowledges that the date of publication does not need to be definite for the exemption to apply.
31. In this case, the MoJ explained that it was necessary to undertake a detailed review of the policy, processes and procedures for collating and approving the data. The MoJ confirmed its intention to publish "*as soon as we complete the internal review and Ministers have been sighted in the usual manner*".
32. Notwithstanding that it may have been appropriate to conduct such a review, in the Commissioner's view the MoJ's argument about such a review process is not inherent to the consideration of the application of section 22. The arguments about any impact on the publication timetable, which are inherent in section 22, are unconvincingly explained and there is a lack of evidence about the impact.
33. In the Commissioner's view, it is clear from the MoJ's submissions that some, at least, of the requested information is destined for publication.

34. However, although the Commissioner accepts that a version of the transparency data will be published at some future date (which at the time of writing is still to be determined), he does not accept that the version which existed at the time of the request will be the same as the one published. This is because the MoJ cannot specify which part or parts of the information, having been checked and verified for any inaccuracies, will be the same as those which existed at the date of the request.
35. It therefore could not be said that, at the date of the request, the MoJ had an intention or settled expectation that all the information for which it has claimed section 22 would be published.
36. Furthermore, the Commissioner notes that under FOIA the right of access is to the information which is held, not information that is accurate. In the circumstances of this case he does not consider it reasonable to delay access to the requested information on the basis that it may be inaccurate.
37. Accordingly, the Commissioner does not find the exemption engaged. As he has not found section 22 engaged, the Commissioner has not gone on to consider the public interest test in relation to that exemption.

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: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.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.

Signed

Steve Wood
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