

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 2 August 2021

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the Ministry of Justice's complaints procedure.
2. The Commissioner's decision is that the Ministry of Justice (MOJ) has breached section 17(1) FOIA. She further finds that MOJ has incorrectly cited section 21 (information accessible by other means) in response to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a copy of the complaints procedure or issue a fresh response without reliance on section 21.
4. 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.

Request and response

5. On 21 June 2020, the complainant wrote to MOJ and requested information in the following terms:

"Please sent [sic] me a copy of your complaints procedure."
6. MOJ responded on 23 September 2020. It confirmed the information was held and cited section 21 FOIA (information accessible by other

means). It provided the following link:

<https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/complaints-procedure>

7. Following an internal review MOJ wrote to the complainant on 6 November 2020. It accepted that its initial response was 'non-complaint' with regard to its timeliness. It also acknowledged that the link it had originally provided was only partially correct and provided a second link. <https://www.gov.uk/government/organisations/ministry-of-justice/about/complaints-procedure>. MOJ further stated that it had provided details of how to appeal against its original decision in its response of 23 September 2020.

Scope of the case

8. The complainant contacted the Commissioner on 31 January 2021 to complain about the way his request for information had been handled and stated that the MOJ responses had failed to provide the full information requested, and the second link goes to a web-site that only contained an address. He further stated that it does not contain the parts of the procedure that he had pointed out were missing in its original response.
9. The Commissioner considers the scope of this case to be to determine if MOJ correctly cited section 21 FOIA in response to the request. She has also considered the timeliness of the response.

Reasons for decision

Section 21 – information accessible to the applicant by other means

10. Section 21 of the FOIA states that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

11. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.
12. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect
13. In the Commissioner's guidance for section 21¹ of the FOIA, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. That is, in order to be exempt, the requested information must be reasonably accessible 'to the applicant'. Unlike consideration of most other exemptions in the FOIA, this allows the public authority to take the individual circumstances of the applicant into account.
14. In effect, a distinction is being made between information that is reasonably accessible to the particular applicant and the information that is available to the general public. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
15. Information is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 of the FOIA in this context, the key point is that the authority must be able to provide directions to the information.
16. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)*²,

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

² <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i146/ENgland.pd>

states that for section 21 to apply, it is necessary to consider whether all of the information is reasonably accessible to the complainant.

17. At paragraph 113 of the decision the Tribunal stated: *"The reasons are that in section 21 the word "reasonably" qualifies the "accessible" and in the majority's view, "reasonably accessible" applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere."*
18. The Commissioner followed the links provided to the complainant to establish what information was available. The first link does not provide any specific information about how to complain about MOJ, only to HM Courts & Tribunals Service and only covers four types of complaint, namely "Handling of your case", "Buildings", "Security" and "Your experience".
19. A complaints procedure is generally considered to be a prescribed method of lodging a complaint. The second weblink does not provide a procedure or any details of how a complaint is dealt with, only an address to send a complaint to.
20. The Parole Board for example <https://www.gov.uk/guidance/complaints-procedure> provides a detailed complaints procedure including advice about what to say in a complaint and the three stages in its complaints process.
21. Therefore the Commissioner does not consider that the MOJ complaints procedure is reasonably accessible to the complainant.

Section 17 – Refusal of request

22. Section 17(1) provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time limit for compliance, citing the relevant exemption(s).
23. In this case the request was submitted on 21 June 2020 and the MOJ's initial response dated 23 September 2020 stated that the information was exempt by virtue of section 21.
24. In view of the above, the Commissioner finds that MOJ breached regulation 17(1) as it took longer than 20 working days to inform the complainant that it was relying on an exemption.

Other matters

25. In his correspondence to the Commissioner the complainant also raised concerns about the lack of explanation for the delay in responding to his request. The Commissioner is not in a position to comment on this as, regardless of any explanation, she has already found MOJ to have breached section 17(1).

26. When making his request for internal review the complainant stated:

"... Furthermore, you state that I have [sic] "If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response." But this part of your complaints procedure is not in the information you pointed me to so either you have withheld information or are supplying false information. On the assumption of the former, please consider this email a formal request for such an internal review"

27. Section 17(7) of FOIA explains that a public authority must inform requestors whether or not it has an internal review procedure in any response it issues to a request for information. This must explain how requestors can ask for an internal review, as well as informing them of their right to complain to the Information Commissioner under section 50 of FOIA should they be unhappy following the review outcome, or if no internal review procedure is in place. The public authority should inform the requester of their right to appeal to the Information Commissioner. If it does not conform to the spirit of the section 45 Code of Practice in relation to internal reviews then the Information Commissioner may highlight this in [decision notices](#).

28. In its response of 23 September 2020, MOJ stated:

Appeal Rights If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

Disclosure Team, Ministry of Justice

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

29. In its internal review MOJ repeated the Appeal Rights as above and further explained:

Please note that FOIA complaints and reviews are dealt with separately by the Disclosure Team and their address can be found at the end of our original response or via the link below:

<https://www.gov.uk/government/organisations/ministry-of-justice>

30. It then concluded with:

If you are not satisfied with this response you have the right to apply to the Information Commissioner's Office (ICO). The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if she considers that we have handled it incorrectly.

31. The Commissioner is satisfied that MOJ provided the complainant with the appropriate contact details and method of appealing against its response, and similarly its internal review.

Right of appeal

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

Website: 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

Susan Duffy
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