

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about the costs incurred by the Crown Prosecution Service ('the CPS') in respect of a court case. The CPS disclosed some information but said that it did not hold the remainder.
2. The Commissioner's decision is that on the balance of probabilities the CPS does not hold any further information falling within the scope of the request.
3. The Commissioner requires no steps to be taken as a result of this decision notice.

Background

4. From information she has found in the public domain, the Commissioner understands that the court case involved multiple defendants facing tax fraud charges. When the case came to court, most of the defendants succeeded in having the charges against them dropped and the CPS admitted that the investigation which had underpinned their prosecution was flawed.

Request and response

5. On 5 August 2018, the complainant wrote to the CPS and, referring to a specific court case, requested information in the following terms:

"1. The total cost incurred by CPS as a result of bringing this case to court and up to the date of this letter. In essence a break-down of cost similar to one which would be submitted to the court, by the Crown, when making an application for prosecution costs to be paid by the defendant. Please note this request extends to money paid and money to be invoiced.

2. Those costs to include advice provided to HMRC investigators, by CPS lawyer and/or independent counsel, both pre and post charge.

3. I also ask for details of costs anticipated after the date of this letter until the conclusion of the costs application.

4. The total hours that have been expended in this case. There should be a time keeping record and I ask you to provide a detailed breakdown of all the employees of the CPS involved in this case and the time they have spent as at the date of this letter."

6. The CPS received the request, which was sent by post, on 10 August 2018. It responded on 10 September 2018. For point (1) it disclosed the total costs paid to Counsel, broken down by payments to Lead Counsel, Junior Counsel and Expert Costs Assessor. It said that it did not hold the information requested at the remaining points of the request. In respect of point (4), it explained that the CPS does not record the time spent by internal lawyers, paralegals and administrative staff on a case-by-case basis.

7. The complainant requested an internal review of the CPS's response to points (2) – (4) of the request on 20 September 2018. The CPS provided the outcome of the internal review on 19 November 2018. It upheld its original response, stating:

"This is a prosecution that has been ongoing for many years, at this stage there is no indication of when it will conclude. Throughout this time the CPS has liaised with HMRC investigators, as well as other relevant third parties, to share information and discuss strands of the case as necessary. It is common practice that CPS staff work on a number of different cases simultaneously - the CPS does not routinely record the time spent by CPS lawyers or caseworkers on individual cases, let alone specific tasks within those cases. I trust this explains why it is not possible for the CPS to answer Question 2 and 4.

I have also further considered whether the CPS can provide anticipated costs for the remainder of this above, we are not in a position to say when this case will be finalised. This is dependent on a number of factors outside of our control, including, but not limited to, whether the defence decide to appeal. It is therefore also not within the gift of the CPS to answer Question 3 above."

Scope of the case

8. The complainant contacted the Commissioner on 1 February 2019 to complain about the way his request for information had been handled. He disputed the CPS's claim that it did not hold information from which it could answer points (2) - (4) of his request.
9. The analysis below considers whether, on the balance of probabilities, the CPS disclosed all the information it held which fell within the scope of the request. The Commissioner has also commented on the time taken to conduct an internal review in the 'Other matters' section.

Reasons for decision

Section 1 – general right of access

10. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
11. In this case, the complainant believes that the CPS holds information about the costs of the work done by its staff, and the time they spent working on the case in question. The CPS's position is that it does not.
12. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
13. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is

not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

14. The complainant said that as a result of a previous request, the CPS had disclosed to him the amount spent on Counsel's fees as of October 2017, and that it was in the public interest that the full and complete costs incurred by the CPS in dealing with the case now be made public. He believed that the CPS had been ordered to pay at least one of the defendants' legal costs. He understood that a bill of costs had been prepared, but the CPS was disputing it. The complainant found it incredible that the CPS could dispute the defendants' costs if it did not hold information about its own costs for comparison. He found it hard to believe that the CPS did not hold information about the time it spent working on the case when he understood time recording to be a common practice across the legal profession.

The CPS's position

15. The CPS explained that it did operate a time recording system for informing general budgetary allocations to CPS Areas (the 14 regional teams responsible for prosecuting cases locally). However, the case in question was handled by a separate team - the Specialist Fraud Division ('the SFD'). The SFD did not, at the time, have the equivalent time recording capabilities for tracking time spent working on individual cases. The CPS said that this would change from 1 April 2019, when a new IT application came into effect which would provide some time recording data in respect of work undertaken from that date.
16. The CPS explained that its position was therefore that it knew that it did not hold the requested information because, at the time the request was received, it did not operate a time recording system for SFD casework from which the time spent by staff working on the case could be calculated.
17. It said that the case dated back to 2010, when it was transferred from the Revenue Customs Prosecution Office ('the RCPO') when the RCPO merged into the CPS. In the early stages post-merger, the former RCPO case management system was used. As cases were transferred to the CPS' case management system, lawyers used a mix of the system's functionality and electronic folders on the shared drive to manage the case, and neither facilitated time recording. The CPS advised that a prosecution file exists but that the case has had a number of successive

lawyers, paralegal officers and administrative staff working on it throughout its history. The CPS said that any attempt to assess the hours spent by the full range of individuals who have ever worked on this case would not be possible because this information was not captured.

18. The CPS clarified that the CPS Casework Divisions receive an annual staffing budget based on volume of cases. The SFD had allocated appropriate Prosecutor, Paralegal and Administrator resources to the case from its baseline budgetary allocation.

The Commissioner's conclusion

19. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 12 and 13, above, the Commissioner is required to make a finding on the balance of probabilities.
20. The Commissioner is satisfied that the CPS has provided a detailed and cogent explanation for believing that it does not hold the requested information. It has explained that the case was handled by the SFD, which, at the time, did not operate a time recording system for its casework. The SFD receives a budget based on the volume of cases it handles. Staff working on those cases are paid on a salaried basis to perform a range of tasks, across multiple cases. Realistically, there would be no way of separating out the time spent on this case either from their other work or from the cost of the work done by those staff on this case.
21. The CPS has also explained to the Commissioner that, at the time of the request, there was no business need for collecting the information (although this has since changed with the introduction of the time recording facility) and that there is no statutory requirement for it to do so.
22. With specific reference to point (3) of the request (for the remaining, anticipated costs), the Commissioner notes that the case remains ongoing and those costs will be dependent on a number of variables that are currently unknown. Having noted what the CPS said about the way in which the SFD is funded, the Commissioner does not consider it unreasonable that the CPS would not currently hold this information. She also notes that it is not obliged by the FOIA to create information that it does not already hold, in order to respond to a request for information.

23. Having taken all the above into account, the Commissioner is satisfied in this case that the CPS has demonstrated that it has reasonable grounds for considering that it does not hold the requested information and, therefore, that it complied with the requirements of section 1 of the FOIA.

Other matters

Section 45 - internal review

24. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
25. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
26. In this case, the CPS took 42 days to conduct the internal review. The Commissioner is not aware of any exceptional circumstances that merited the review requiring beyond 20 working days and would remind the CPS of the importance of providing such reviews promptly. A separate record has been made of this delay and this issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

27. 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

28. 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.
29. 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

Samantha Bracegirdle
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