



**IN THE FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]**

EA/2016/0138

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50616675
Dated: 9 May 2016**

Appellant: SIMON PRICE

Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 13 September 2016

Date of Decision: 19 September 2016

Date Promulgated: 21 September 2016

Before

Annabel Pilling (Judge)

Subject matter:

FOIA – Whether information is held – s.1

Representation:

For the Appellant:

Simon Price

For the Respondent:

Louisa Smith, Elizabeth Kelsey

Decision

For the reasons given below, the Tribunal allows the appeal. This Decision is to be treated as a substituted Decision Notice.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 9 May 2016.
2. The Decision Notice relates to a request made on 20 July 2015 by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Ministry of Justice (MoJ) for information in respect of the provision of kosher food for strictly observant Orthodox Jewish prisoners:

"In June 2015 the Kitchen Manager at HMP Wakefield claims that he was advised...that any prisoner who the Ministry of Justice has agreed is a strictly observant Orthodox Jew and ...must be treated as such, must nonetheless arrange for his shul to provide the appropriate kosher food as set out in paragraph 3.24 of the Catering Operation Manual?"

In light of the above please provide me with all available data relating to the following matters:

1. *The full details of the instructions and procedure whereby any prisoner who the Ministry of Justice has agreed must be treated as a strictly observant Orthodox Jew must nonetheless arrange for his shul to provide the appropriate kosher food as set out in paragraph 3.24 of the Catering Operation Manual?*
2. *On what authority or in what Prison Service Instruction has any such instruction/provision been made for any prisoner to have food brought in from outside the prison?*

3. *The relevant instructions given to Security departments in the High Security estate in order that they may comply with the practice described in (1) above*
 4. *What provision is currently made in compliance with paragraph 3.24 of the Catering Operation Manual for strictly Orthodox Jewish prisoners to receive appropriate kosher food from the prison?*
 5. *What arrangements are in place for a Foreign National prisoner who is a strictly Orthodox Jew to be provided with appropriate kosher food?"*
3. The MOJ responded on 5 October 2015, confirming that the department holds some but not all of the information requested "*as there is no requirement for this information to be centrally held*" and provided information which was held relevant to the request. This pointed the Appellant to the standards of provision which establishments must meet set out in a Prison Service Instruction (2010/44) which is normally available within the prison library, and then reproducing the relevant parts of the guidance issued to prisons regarding religious diets specifically those who require a Kosher meal, that is paragraphs 3.22-3.25 of the Catering Operation Manual.
 4. The Appellant requested an internal review, complaining that the response was "*little more than a cut and paste extract from the Catering Operation Manual, a copy of which, as my request would clearly have indicated, I already possess.*"
 5. The MOJ responded on 6 January 2016, indicating that having spoken to the Head of Catering at Wakefield prison, there is no other written communication or guidance about the matter at Wakefield.
 6. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the MOJ. He concluded that on the balance of probabilities the MOJ has provided all the recorded information it holds relevant to the request, where that information is not covered by section 21 as reasonably accessible to the Appellant from documents usually available in the prison library, namely the

Prison Service Instruction 44/2010 (the 'PSI') and the Catering Operation Manual (the 'COM'). He also found that the MOJ had breached section 17(1) of FOIA as it failed to provide its refusal to respond within 20 working days.

The appeal to the Tribunal

7. The Appellant appeals against the Commissioner's decision, maintaining that there must be further information falling within the scope of his request beyond the PSI and COM, copies of which he has had for some time in any event.
8. This is an appeal that can be heard by a Judge sitting alone under Practice Statement 11.
9. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties, including submissions dated 8 September 2016 from the Commissioner. The Appellant appeared by video link. The Commissioner chose not to attend the hearing. The MOJ was not joined as a party and took no part in the appeal.

The issues for the Tribunal

10. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
11. Where an applicant complains to the Commissioner, or the Tribunal, that a public authority, here the MOJ, has wrongly determined that it does not hold any further information falling within the scope of a request for information under FOIA this raises an issue of fact for the Commissioner, or the Tribunal. The Tribunal will review the evidence and make a finding of fact on the balance of probabilities.
12. After lodging his appeal, the Appellant was provided with information pursuant to another request for information which, arguably, was for information also falling within the scope of this request. In March 2016

the Appellant was provided with a copy of the advice and guidance provided by the individual named in the preamble to this request concerning the provision of kosher food to Orthodox Jewish Prisoners at Wakefield prison. It would appear from the dates of the emails in question that these post-date the request, although the Commissioner had not been provided with this information during his investigation. The MOJ maintains, by email to the Commissioner dated 12 August 2016, that the only information it holds relevant to the request is the PSI and the COM.

13. Although the MOJ maintains that its practices and procedures for the provision of kosher food to prisoners are contained exclusively in the PSI and the COM, the PSI and COM are national documents setting out general provision policy across the prison estate. I accept the unchallenged evidence of the Appellant that arrangements above and beyond those set out in the PSI and COM are in existence at HMP Wakefield in respect of another prisoner, also a strictly observant Orthodox Jew and also a Foreign National.

14. For those arrangements to exist, it would be inconceivable that authority would not be needed from a senior source, whether from a Prison Governor or elsewhere. It would be inconceivable that a decision for a prisoner to be provided with a dedicated refrigerator inside a high security prison would not have been approved without written authority. Those arrangements would likely have been the subject of advice from Jewish faith advisors and in my view it is inconceivable that this would not have been recorded.

15. Once in place, the refrigerator is used on a regular basis by the prisoner and kosher foodstuffs, beyond those provided to other strictly observant Orthodox Jewish prisoners, are brought into the prison. If these foodstuffs are not provided by the prison directly, which appears to be the case on the basis of the material before me, it follows that there must be arrangements for its delivery. If the items are provided by the prison directly, again in my view there must be some recorded decision to do so and setting out the appropriate arrangements.

16. As HMP Wakefield is a high security establishment, items from an

unidentified person could not simply be left at a main gate and taken to the prisoner directly without more. At a minimum, there must exist written guidance in respect of, for example, how often items can be delivered, who by, when delivery could take place, what those items could be, how they are to be delivered, how they are to be packaged and setting out the arrangements for inspecting those items before transporting to the prisoner or the prisoner's refrigerator.

17. At no stage does there appear to have been any enquiry made of the Prison Governor or Head of Security. I do not have any information in respect of the role or remit of the Head of Catering. I am not satisfied that the MOJ has made a reasonable search for information falling within the scope of this request.

18. On the balance of probabilities I am satisfied that the MOJ must hold further information falling within the scope of the request. The Commissioner was wrong to conclude that the only information held was the PSI and the COM. It follows that the Commissioner was incorrect to conclude that the MOJ was entitled to rely on section 21 of FOIA in relation to parts 1, 2, 3 and 5 of the request. The PSI and the COM may well be reasonably accessible to the Appellant and he accepts that he has his own copies in any event, but further information falling within the scope of these parts of the request must be held.

19. I cannot order any specific disclosure as the MOJ will have to consider what further information is held, whether the cost of complying would exceed the appropriate limit or whether any part 2 exemption might be applicable.

Judge Annabel Pilling

19 September 2016