

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 November 2010

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

Summary

The complainant asked the Ministry of Justice (the "public authority") to provide information relating to an offender's criminal convictions. The public authority initially neither confirmed nor denied ("NCND") holding any information citing the exemption at section 40(5) (personal information) of the Freedom of Information Act 2000 (the "Act").

During the Commissioner's investigation the public authority introduced section 12 (the "appropriate limit"). Following further inquiries it subsequently claimed that it did not in fact hold any of the requested information.

The Commissioner's decision is that, on the balance of probabilities, the public authority holds no information. The complaint is not upheld.

The Commissioner's role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background information

2. The request centres around the conviction records for a prisoner who was incarcerated during 1981. The length of sentence of the prisoner is not known, nor is his crime.
3. The Prison Department's internal Circular Instruction 20 of 1978, *"Central Storage of Records of Inmates Discharged after Serving a Sentence of 3 Years or Over"*, was current during 1981. It included the following instructions, and was sent to all Prison Department establishments:

"From May 1978 onwards every establishment should complete [an] index card on discharge of all inmates who have served a sentence of 3 years and over..... Each record should be despatched to [central storage] with the index card pinned to the front."

and

"Records of inmates who have been discharged after serving sentences of less than 3 years should be retained at the discharging establishment..."

4. Circular Instruction 44 of 1978, *"Storage of Discharged Inmates Records (Form 1150): Period for Preservation"*, which was also current at the time the prisoner was incarcerated, states that records for inmates had previously all been retained for 20 years following discharge. This instruction varied this procedure and stated that:

"... inmates discharged from life imprisonment, from detention under Section 53 of the Children and Young Persons Act of 1933, or from sentences of imprisonment of three years or more will continue to be preserved for 20 years".

5. Those with sentences of less than 3 years were to be retained for 10 years from the last date of discharge, except in specific listed circumstances. They were to be retained at the establishment where discharged and destroyed locally when 10 years old.
6. The current retention policy for prisoner records is available online¹. Although it was in effect at the time of this request, it does not apply

¹http://pso.hmprisonservice.gov.uk/pso_9025_archiving_and_retention_policy.doc#_1.1_PRISONER_RECORDS:

to the records which are the subject of this request. The current policy indicates the following time periods for retaining prisoner records.

- *For Lifers and those records selected for special retention: 99 years from the date of birth (unless the inmate dies whilst in custody, where a 20 years retention [sic] after death).*
 - *For prisoners sentenced to a total of 3 months or over, in respect of any one period in custody: 6 years from date of discharge or date of last action of the files (which ever is the latest).*
 - *For any other prisoner received in to custody (either on remand or convicted): 1 year from date of discharge or last action on file (whichever is the latest).*
7. Reference has also been made to the Criminal Records Bureau (the "CRB"). According to its website²:

"The Criminal Records Bureau (CRB), an Executive Agency of the Home Office, provides wider access to criminal record information through its Checking service.

This service enables organisations in the public, private and voluntary sectors to make safer recruitment decisions by identifying candidates who may be unsuitable for certain work, especially that involve children or vulnerable adults".

The request

8. On 24 August 2009 the complainant made the following request:

"... please can you send me all you can on [name removed] convictions".

9. With his information request, the complainant provided copies of two extracts from Hansard, which identified the person about whom he was seeking information. These extracts referred to a prisoner who was
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² http://www.crb.homeoffice.gov.uk/about_crb/what_is_the_crb.aspx

- incarcerated from 1981 and who had been imprisoned in various named prisons.
10. On 4 September 2009 the public authority responded. It neither confirmed nor denied holding any related information by virtue of section 40 of the Act.
 11. On 14 September 2009 the complainant sought an internal review.
 12. On 29 September 2009 the public authority sent a response. It upheld its original position in neither confirming nor denying that it held any information by virtue of section 40(5). It advised him that:

"Section 1(1)(a) of the Freedom of Information Act (right to information) does not apply by reason of section 40(5) which, if not applied, may contravene Section 10 of the Data Protection Act 1998 or any of the data protection principals [sic]. This is not to be taken as an indication that the information you requested is or is not held by the department".

The investigation

Scope of the case

13. On 1 October 2009 the complainant wrote to the Commissioner to complain about the way his request for information had been handled. He provided the Commissioner with some background details and his reasons for wanting the information.
14. On 4 November 2009 the Commissioner wrote to the complainant seeking documentation covering his request. He advised the complainant that his case would be closed until this was provided as it was a necessary part of his investigation.
15. On 6 March 2010 the complainant again wrote to the Commissioner raising his concerns about a person he described as a '*convicted paedophile*'. He provided additional paperwork.
16. The Commissioner would here note that he is not able to undertake any specific investigation into whether or not the named party is the same party referred to in the Hansard extracts provided by the complainant; he can only determine whether or not any information is held and, if it is, whether or not it should be placed in the public domain.

17. Were it possible to determine the identity of the named party within the Hansard entries, it is outside the Commissioner's jurisdiction to comment on someone's suitability for a post of employment or to determine whether or not that party should have been subject to a CRB check in order to fulfil that post.
18. Therefore, although the complainant has also raised other issues, they are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

19. On 11 March 2010 the Commissioner advised the public authority that he had received a complaint. He raised some initial enquiries, prior to formally investigating the case.
20. In its response of 16 March 2010 the public authority advised the Commissioner that:

"I can confirm that we don't know whether we hold this information and to check whether we hold it would exceed the cost limit. [The complainant] has attached Hansard extracts that clearly indicate that [name removed] was imprisoned in the 1980's, however, these records may or may not still exist as the nature of the offence dictates the length of time they would be retained.

I should explain that it is MoJ policy to NCND under section 40 of the Act whether we hold information concerning convictions of individuals to third parties. I can also confirm that since this is our policy we did not check to see if we held this information as even if we knew that it was or was not held we would not confirm this to the requester in any event, so the effort of searching for the information would be a waste of resources.

We believe that any information we hold concerning convictions of [name removed] would be automatically excluded from the duty imposed by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i) of the Act."

21. On 7 July 2010 the complainant wrote to the Commissioner again and provided further background information in support of his case.

22. On 14 July 2010 the Commissioner wrote to the complainant to advise him that he was ready to commence his investigation. He explained the following points:

"The MOJ has chosen to neither confirm nor deny holding any information about [name removed]. My Decision Notice will therefore focus on whether or not it was correct in doing so. It is important that you understand that I will not be determining whether or not the MOJ should release any information that it may hold. I am only able to consider whether or not it was correct in neither confirming nor denying that holds any information.

It is also important that you understand that I am unable to comment as to whether the [named party] referred to in the Hansard entry is the same [named party] that you say is now [employment position]. I am also unable to comment on your allegations that [named party] has somehow evaded the CRB checking system".

23. The complainant telephoned the Commissioner to discuss his case on the same day. He also emailed confirmation and accepted the Commissioner's remit.
24. On 14 July 2010 the Commissioner also wrote to the public authority to advise that he was commencing his investigation. He commented on its citing of the appropriate limit in its email of 16 March 2010 and sought clarification regarding its position.
25. On 15 July 2010 the public authority telephoned the Commissioner to discuss the case.
26. On 30 July 2010 the public authority wrote to the complainant. It advised him as follows:

"We have agreed to revisit this decision following discussions with the ICO.

We have noted that you question our decision to NCND under section 40(5) as the Hansard extracts you provided with your request clearly indicate that [name removed] was imprisoned at HMP [name removed] in the 1980's.

We accept that we should not have used a blanket NCND under section 40(5) of the FoIA to withhold this information as the Hansard extracts confirm that [name removed] was imprisoned

in the 1980's. However, we can neither confirm nor deny whether we hold information on other convictions under section 40(5).

We are also satisfied that we would not be in a position to provide information on [name removed]'s past convictions on cost grounds. Section 12 of the FoIA makes provision for public authorities to refuse requests for information where the cost of dealing with them would exceed the appropriate limit. The appropriate limit for central Government is set at £600, which represents the estimated cost of one person spending 3½ working days in determining whether the Department holds the information, and locating, retrieving and extracting the information.

The only way we could ascertain whether we hold information on [name removed]'s past convictions would be to ask every Crown and Magistrate court to search their records which would exceed the cost limit and engage section 12(2) of the Act.

We have also considered whether it would be possible to retrieve the information from prisoner files, but found that without a prisoner number or date of birth it would be near impossible to retrieve the correct file from the thousands of prisoner files held. We have done a search of our Inmate Information System and found 52 [instances of name, removed] on the system, and without a prison number or date of birth it would be impossible to identify the correct one.

We cannot advise on how you could refine your request so that it fell within the cost limit because there is the added complication that [name removed]'s prison file may not still be retained by the Ministry of Justice since his conviction dates back to the 1980's. The retention schedule for prisoner files varies according to prisoner sentence, for instance the prisoner file for a prisoner sentenced to life would be retained for 99 years from his date of birth whereas the prison file for a prisoner sentenced to over 3 months would be retained for 6 years from the date of their release".

27. On 3 August 2010 the complainant telephoned the Commissioner regarding the response. He disputed that it would exceed the appropriate limit to locate the requested conviction data. He then put his concerns in writing to the Commissioner stating that, as the party was known to have been in a named prison on a named date, the public authority would only need to look for records at that particular prison. He also offered to send the Commissioner the party's date of birth as he believed he could readily obtain this – an offer which the

Commissioner declined as this had not been previously given to the public authority.

28. On the same day, the Commissioner raised further queries with the public authority.
29. On 10 August 2010 the complainant wrote to the Commissioner and provided the party's date of birth.
30. On 16 August 2010, following discussions with a representative of the public authority who had a detailed knowledge of the prison service's records management, and in agreement with the public authority, the Commissioner wrote to the complainant with further information, as follows.
 - The prisons named in the Hansard extracts were all classed as 'adult prisons' so an inmate would need to have been at least 21 years of age to be there. Therefore, the party referred to must have been born in 1960 or earlier.
 - The "Inmate Information System" identified 52 entries under the name of the party in which the complainant was interested. These entries each related to a period of imprisonment rather than 52 individuals, e.g. if the same person went to prison on 3 occasions they would have 3 separate entries.
31. The Commissioner also advised the complainant that he had personally viewed the 52 entries and that there were only two which referred to someone born in 1960 or earlier. Neither of these entries referred to someone who was imprisoned in any of the prisons named in the Hansard entries, nor did either refer to offences which occurred during the 1970s or early 1980s. Furthermore, they did not relate to offences of the type being alluded to by the complainant. Accordingly, the Commissioner advised the complainant that he was satisfied that none of the entries in the "Inmate Information System" (the "IIS") matched those in the Hansard entries provided.
32. Following further enquiries, the public authority also advised the Commissioner that:

"While IIS would potentially archive information from 1991, if [name removed] was discharged before then he would not have been entered on the system and his paper record would have been destroyed in accordance with circular instruction 23 of 1990 which states six years from date of discharge (unless identified for special retention)".

33. The Commissioner asked the complainant whether he would consider withdrawing his complaint. He declined.

Analysis

Substantive procedural matters

Section 1 – general right to access to information

Is relevant recorded information held?

34. In the Commissioner's view, the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities. This is in line with the approach taken by the Information Tribunal in the case of *Bromley & others v the Environment Agency* [EA/2006/0072], in which it stated:

"...we must consider whether the Information Commissioner's decision that the Environment Agency did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities...";

because

"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records".

35. In deciding where the balance lies, the Commissioner will usually consider, among other things, any reasons offered by the public authority to explain why the information is not held.

Explanations provided by the public authority

36. In correspondence with the Commissioner the public authority has confirmed the following.

- Records of prisoners used to be held on the IIS, which has subsequently been replaced by a new system called the "National Offender Management Information System" (the "NOMIS").
- The IIS is the older system but it did not exist in 1981. There would only have been a paper record at that time.
- All the centrally-held prisoner details are recorded on one of the databases (either NOMIS or IIS).
- The four prisons named in the Hansard entries were all classed as 'adult' prisons in 1981 and inmates would need to have been at least 21 years of age. Therefore, any inmate in 1981 must have been born in 1960 or earlier.
- A search was undertaken using the name of the party concerned and this returned 52 possible matches.
- Of these 52 possible matches, only two referred to a party or parties of a suitable age; neither referred to any of the prisons stated or were for offences which occurred in the 1970s or early 1980s.

The Commissioner's position

37. From the information known, it is not possible to ascertain why the named prisoner was incarcerated, the length of his sentence, when he was released or, indeed, whether he is still 'inside'. The Commissioner assumes the latter is not an option as there are no 'matches' on either of the public authority's current systems.
38. According to its policies from 1978, if the prisoner had a sentence of more than 3 years his record would have been retained centrally for 20 years from the date of his discharge, which could have occurred at any time after 1981. If his record still existed centrally, the Commissioner would expect it to be recorded on either NOMIS or IIS; it isn't.
39. Conversely, if the prisoner had served a sentence of less than 3 years then his record would have been held locally for 10 years and then destroyed. There would have been no requirement to forward it for central preservation.
40. In discussion with the public authority, the Commissioner was advised that there is a remote possibility that a paper record for a prisoner may still be retained at the final prison where he was held. However, it further explained that, in line with its 'weeding' policies, it would expect that any such record would have been destroyed. On the

balance of probabilities, and in line with the instructions covering its retention of prison records, the Commissioner accepts that there is only a remote chance that such a record would exist. In any event, he notes that the final prison where the named party was located is not known, neither are its category nor his release date, and the Commissioner therefore believes it is not feasible to commence a search – there are over 140 prisons listed on Her Majesty's Prison Service website – as this would clearly exceed the appropriate limit under section 12(2) of the Act (see legal annex).

41. The Commissioner considers that the explanations provided to the complainant provide a reasonable explanation of its position. Therefore, on the balance of probabilities, he agrees with the public authority's position that it holds no information and he does not require any further search to be undertaken. The Commissioner has therefore determined that the public authority has complied with section 1(1)(a) in correctly stating that it holds no recorded information.

The Decision

42. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps required

43. The Commissioner requires no steps to be taken.

Other matters

44. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following.
45. The Commissioner is satisfied that, in this particular case, the public authority no longer holds any record. However, conviction data would still be held by the Court where the party was sentenced and a record is also likely to be held on the Police National Computer. The Commissioner did advise the complainant of this – although he also advised the complainant that he believes it is unlikely that either of these would release information to anyone other than the party concerned. This is because information of this type, namely the

commission of a criminal offence, is classed as 'sensitive personal data' and disclosure except for the purpose for which it was retained is likely to breach the Data Protection Act. As such, even were it available elsewhere, the Commissioner considers that it is highly unlikely that any detail would be suitable for release into the public domain.

Right of Appeal

46. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 10th day of November 2010

Signed

**Jon Manners
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Section 1 - General right of access to information held by public authorities

- (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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority—
 - (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

Section 12 – cost of compliance exceeds appropriate limit

- (1) 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.
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
- (3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.