

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 December 2010

Public Authority: The Ministry of Justice
Address: Information Directorate
Zone 6B
102 Petty France
London
SW1H 9 AJ

Summary

On 24 October 2009, the complainant requested that the Ministry of Justice (the 'MoJ') should provide him with information regarding how many male prisoners had been allowed to use artificial insemination with their partners in each of the last ten years and how many female prisoners had become pregnant in the same time period. The MoJ refused the information under section 12(1) of the Freedom of Information Act 2000 (the 'Act'). The MoJ explained that to locate the information would involve searching the general prisoner records and that this would exceed the cost limits. It confirmed that the information was not recorded elsewhere. The Commissioner is satisfied that the cost of locating the information would exceed the guidelines and therefore finds that the MoJ was correct to apply section 12(1) of the Act.

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.

The Request

2. On 24 October 2009, the complainant requested the following information:

'Please could you tell me how many male prisoners have been allowed to make babies by artificial insemination of their wives / partners in each of the last 10 years.

How many female prisoners have got pregnant in each of the last 10 years'.

3. On 23 November 2009, the Ministry of Justice (the 'MoJ') responded to the complainant. It confirmed that it held information within the scope of the request. However it refused to provide the information requested under section 12 of the Freedom of Information Act 2000 (the 'Act').
4. The MoJ explained that the National Offender Management Service ('NOMS') does not hold the requested information centrally. It outlined the work involved in locating and extracting the information regarding women prisoners but made no reference to the information concerning male prisoners.
5. It does centrally hold information relating to pregnant women and mothers and babies in prison to aid its management of places on Mother and Baby Units. There are 7 such units in England and Wales with a total capacity of 75 places.
6. In order to comply with the request, the MoJ explained that it would have to manually search individual prisoner records at each of the 13 prisons which hold female prisoners, plus those which did hold females in the past but now no longer do (there are 4 of these).
7. The MoJ invited the complainant to narrow the scope of his request, although it pointed out that the cost limit might still be engaged.
8. The complainant requested an internal review on 30 November 2009.

The Investigation

Scope of the case

9. On 10 December 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Following the completion of the internal review, the Commissioner's investigation has focused on whether the requested information could be provided to the complainant.

Chronology

10. On 23 December 2009 the Commissioner wrote to the MoJ to inform it that a complaint had been received. The MoJ acknowledged this on 30 December 2009 and on 5 January 2010 provided the Commissioner with a cost breakdown of the potential work involved in answering this request.
11. The MoJ's cost breakdown gave the following data with respect to the requested information concerning the women prisoners:
 - Approximately 40,000 files would have to be searched across the prisons which held (or had held) women prisoners.
 - At 10 minutes per file this would equate to 7,005 hours of work.
 - At the rate of £25 per hour this would total £175,147.
12. On 9 February 2010 the MoJ sent the complainant an internal review. The MoJ explained that the information requested was exempt under section 12 of the Act. The data regarding female prisoners would have to be collated from 17 prisons and this would cost more than the limit of £600.
13. The MoJ suggested that the request regarding female prisoners might be narrowed to one establishment to bring it within the cost limit.
14. On 22 February 2010 the Commissioner wrote to the MoJ and requested further clarification regarding its refusal to provide information regarding male prisoners under section 40(2) of the Act and female prisoners under section 12. The Commissioner had been sent a copy of an internal review letter which indicated that the request had been refused under both exemptions.

15. In this internal review response, the request concerning male prisoners was refused because the figures involved were so small that by a process of deduction, an individual could be identified. The MoJ therefore argued that disclosure of the information would contravene section 10 of the Data Protection Act 1998 (the 'DPA') or any of the data protection principles.
16. On 9 March 2010 the MoJ asked the Commissioner to clarify his reference to a refusal under section 40(2) in the internal review. The MoJ could find no comment regarding Section 40(2) in its first response, in the internal review or its letter to the Commissioner dated 5 January 10.
17. On 10 March 2010 the Commissioner wrote to the MoJ and explained that the ICO appeared to have two versions of an internal review letter. One of these letters referred to section 40(2) of the Act and the other did not. One of the letters appeared to only address the question concerning women prisoners and not that concerning male prisoners.
18. On 10 March 2010 the MoJ clarified that the confusion had arisen as it had prepared two internal review responses. It did not send the complainant the one which referred to section 40(2) as it decided that the whole request came under the provision of section 12. However, on 11 March 2010, the MoJ now confirmed that it was applying section 40(2) to the question regarding male prisoners and section 12 to the question regarding female prisoners. It was treating them as separate requests.
19. On 30 March 2010, 16 April 2010 and 20 April 2010 the Commissioner asked the MoJ for a response to his letter of 22 February 2010.
20. On 4 May 2010 the MoJ responded to the Commissioner's letter of 22 February 2010. It clarified that the 40,000 records that would need to be searched to obtain the information about female prisoners were the total number of records that were held in the 13 current women's prisons and on behalf of 4 prisons that had held women. These were general prisoner records as their medical records are held by the Department of Health.
21. The MoJ estimated that as there were in total 40,000 records held for the 10 years covered by the request, on average 4,000 records would need to be searched for each year. It estimated that even one year's records at approximately 3 minutes per record would take 200 hours to search.

22. The MoJ gave the Commissioner the dates the Mother and Baby Units were created but explained that the information centrally held for these regarded monitoring and managing demand for places. Each unit provided data regarding the number of current residents and approved applications. This data did not help answer this information request.
23. The MoJ did not centrally hold any data concerning any special arrangements for women to become pregnant whilst in prison. No such arrangements have been made.
24. The response did not address the issue of male prisoners.
25. On 11 May 2010, in a telephone conversation, the MoJ confirmed that Mother and Baby Units did not have a record of all pregnancies as pregnant prisoners had their babies in hospitals near the prisons. There were no central files which hold this information and they would have to search all the manual prisoner records in the individual prisons. The MoJ explained that if a woman prisoner was to become pregnant in a prison the only person who could have fathered the child would be a member of prison staff.
26. On 12 May 2010 the Commissioner wrote to the MoJ and asked it to confirm that it did not hold information (other than that held in general prisoner files) which might record the fact that a woman had become pregnant whilst in custody. As this would be a most unusual occurrence under any circumstances, the MoJ was asked to check that this would not be recorded in other records, either centrally or by the individual prisons. The MoJ was asked if NOMS had a policy which addresses the issue of women prisoners becoming pregnant and whether inquiries are made as to the circumstances should this happen.
27. The MoJ was asked to provide a response to the Commissioner regarding male prisoners.
28. On 26 May 2010 the MoJ was asked to respond.
29. On 11 June 2010 the MoJ confirmed that there are no formal arrangements for female prisoners to conceive. Such information would be held in prisoner files held at the prisons. There are no central records which record such information held by the Department of Health or the MoJ.
30. The MoJ explained that there is no policy which addresses the issue of women prisoners becoming pregnant. If there was an incident out of the ordinary, a local investigation would take place to identify the facts and local records would be held.

31. On 14 June 2010 the Commissioner asked the MoJ to confirm whether such local records would be held as investigation files or whether such investigation records would be held within the files of each prisoner. The MoJ was asked to provide a response to its questions regarding male prisoners.
32. On 15 June 2010 the MoJ informed the Commissioner that the citing of section 40 in the internal review with respect to the information regarding male prisoners was incorrect. The MoJ explained that with respect to the men, exactly the same position is employed as with women prisoners in that no central records are held and files of all prisoners would have to be searched to find this information.
33. The MoJ explained that section 40 was mentioned in the internal review because if there were records which held the information and which could be identified, the numbers of men involved would be so small that section 40 would apply to that information. The MoJ was also now of the opinion that this would be the same if it could identify women's pregnancies but it was still pursuing NOMS to investigate if records could be identified.
34. On 17 June 2010 the Commissioner asked the MoJ to confirm that it now wished to apply section 12 to that part of the request which concerned male prisoners. The MoJ was asked to confirm if the relevant information would be held in the general prisoner records of the men. If so, it was asked to provide a breakdown of the time it would take to locate the information in the files in the male prisons. It was asked how many files and how many prisons were involved. It was also asked to confirm whether other records might exist which would hold the requested information.
35. On 16 July 2010 the MoJ was asked to respond to the email of 14 June 2010 regarding female prisoners and the email of 17 June 2010 regarding male prisoners.
36. With regard to investigations into women prisoners becoming pregnant, on 22 July 2010 the MoJ explained that prior to February 2009 the registering of investigations and storage of final reports was conducted by the Investigation Support Section (ISS) of the Professional Standards Unit. Therefore reports before this date may be held in the central storage facility at Branston. It may be possible to trace individual files via the Corruption Prevention Unit who hold the ISS historical database.

37. The MoJ explained that since February 2009 all Human Resources officer disciplinary related investigations have been registered and managed at the National Shared Service Centre (NSSC). Such reports could therefore be accessed through the NSSC.
38. The MoJ has since clarified (on 7 September 2010) that these investigations files are prison officer disciplinary files and investigation files. They are catalogued by staff name and number and prisoner name and date of release. There are approximately 10,000 of them and it would take at least 3 minutes per file to search. This totals 500 hours. The files themselves are also unlikely to detail any investigation into a woman prisoner becoming pregnant as this would be considered a criminal offence and the police would have been called in and asked to investigate.
39. On 30 July 2010, the MoJ also explained that it holds 460,000 prisoner files at Branston for released prisoners and it would take far in excess of 3 minutes per file to search each of these records. Some files are contained in numerous boxes for one prisoner. These files are catalogued by prisoner name and number only.
40. The MoJ explained that even if it took 1 minute per file, the work would be in excess of the cost limit.
41. This information at Branston applies to released male and female prisoners. The women's prisons usually keep the records of released prisoners; however these records are held at Branston if a prison has changed from a female prison to a male one.
42. On 2 August 2010 the MoJ was asked to answer the Commissioner's question of 17 June regarding male prisoners.
43. On 3 August 2010 the MoJ confirmed that there are currently 80,325 male prisoners in England and Wales. Therefore it would mean searching each of those prisoner's files to establish if any of them fell into the scope of the requested information. As the complainant had asked for data covering the past 10 years, this would also entail locating and searching all the files at Branston of prisoners that have been released during that period. There are currently 125 male prisons.
44. The MoJ confirmed that it wished to apply Section 12 to that part of the request which concerned male prisoners.

Analysis

Substantive Procedural Matters

Section 12

45. The full text of section 12 is available in the Legal Annex at the end of this Notice.

46. Section 12(1) states:

'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.'

The appropriate limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). A public authority may take into account the cost of locating, retrieving and extracting the requested information in performing its calculation. For central government, this cost limit is currently set at £600 and equates to 24 hours of work at £25 per hour.

47. The MoJ has confirmed that it does not centrally hold the requested information for current male or female prisoners.

48. The MoJ has clarified that it would need to search approximately 40,000 general prisoner records to obtain the information about female prisoners. This includes searching for the information held across the current 13 women's prisons. Likewise, there are currently 80,325 male prisoners in England and Wales and each of these prisoner files would need to be searched across 125 male prisons to establish if any of them fell into the scope of the requested information regarding male prisoners.

49. To access records for the past ten years the MoJ would have to search the files that it holds for released prisoners at its storage facility at Branston. There are 460,000 files held here.

50. The MoJ has confirmed that its central storage facility does not hold any other sorts of files which concern women becoming pregnant whilst in custody.

51. The MoJ has also confirmed that it has no policy or scheme regarding artificial insemination on behalf of male prisoners. It has no policy which addresses the issue of women prisoners becoming pregnant.

52. The MoJ has therefore calculated that it could not provide the information with regard to either question within the cost limit. The Commissioner has examined the evidence and is satisfied with the MoJ's responses. He has therefore concluded that Section 12(1) has been correctly applied to this request.
53. As the requested information is held in the general prisoner files, it is apparent that the cost provision would also apply to any refined request which might limit the time period specified. Any request narrowed by time would still involve searching the prisoner files held at each prison. The complainant has also indicated that he is interested in comparing male and female treatment in prisons with regard to having children. It would therefore appear that offering him the information from one prison only would not be satisfactory. In addition, the complainant has indicated that he does not accept that the requested information is held only in prisoner files. He believes that the information must be held centrally. For these reasons, the Commissioner is satisfied that the MoJ is unable to offer advice and assistance as required under section 16(1) of the Act.

The Decision

54. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The MoJ correctly applied section 12(1) to the information requested.

Steps Required

55. The Commissioner requires no steps to be taken.

Other matters

56. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

57. The complainant requested an internal review on 30 November 2009. It was provided on 9 February 2010, 48 working days later.
58. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.
59. During the course of his investigation, the Commissioner has encountered considerable delay on account of the MoJ's reluctance to meet the timescales for response set out in his letters. Accordingly the Commissioner does not consider the MoJ's approach to this case to be particularly co-operative, or in keeping with the timescales set within the Memorandum of Understanding. As such he will be monitoring the MoJ's future engagement with the ICO and would expect to see improvements in this regard.

Right of Appeal

60. 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 21st day of December 2010

Signed

**Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“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.”

Section 12(2) provides that –

“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.”

Section 12(3) provides that –

“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.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.