

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2012

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

Decision (including any steps ordered)

1. The complainant has requested information about the cost of the provision of Sky television to prisoners at HM Prison Dovegate, including the number of Sky channels they have access to, and the numbers of cells in the prison which have telephones within them. The Ministry of Justice confirmed that it does not hold any of the requested information, explaining that HMP Dovegate is a private contracted-out prison which is not covered by the Freedom of Information Act 2000 (the 'FOIA'). The Information Commissioner's decision is that on the balance of probabilities, the Ministry of Justice does not hold any of the requested information. He requires no steps to be taken.

Request and response

2. On 9 September 2011 the complainant wrote to the Ministry of Justice (the 'MOJ') and requested the following information:

"I am a [job title redacted] at [location redacted] and would first like to request the following information please under the Freedom of Information Act 2000. Firstly, could you inform me of the total cost of providing Sky television to prisoners at HMP Dovegate including the number of Sky channels that they have access to. Secondly could you provide me with information regarding the number of cells in this establishment that have telephones inside them."

3. The MOJ responded on 6 October 2011. It stated that it did not hold the requested information, explaining that as a privately run prison, HMP

Dovegate is not included in schedule 1 of the FOIA and is therefore not obliged to provide any information under the FOIA's provisions. The MOJ provided the complainant with contact details for HMP Dovegate.

4. Following an internal review the MOJ wrote to the complainant on 1 November 2011 upholding the original decision.

Scope of the case

5. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled. At the start of the investigation the complainant asked the Information Commissioner to consider his view that the MOJ should hold information because HMP Dovegate falls under its umbrella.
6. The Information Commissioner has considered whether, on the balance of probabilities, any of the requested information is held by the MOJ.

Reasons for decision

7. Section 1 of FOIA states that:

"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."*

8. The Information Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)*. It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Information Commissioner will apply in this case.
9. The Information Commissioner is satisfied that neither the contractor, Moreton Prison Services, nor the prison itself are covered by FOIA in their own right as they are not listed and are not Executive Agencies of the MOJ.

10. He does not however consider that the fact of 'contracting out' the service provision for the prison would result in the MOJ ceasing to hold all information relating to that prison. In cases such as this, the Information Commissioner believes it is necessary to look at the nature of the information requested.
11. The Information Commissioner requested a copy of the contract between the MOJ and Moreton Prison Services, which was provided on the basis that it would not be placed in the public domain due to its sensitive nature and commercial sensitivities. The contract is necessarily very detailed. Ultimately the MOJ is responsible for ensuring both the proper operation of the penal system and public and prisoner safety. The Information Commissioner notes that although the Secretary of State for Justice may contract out prison services, he can only do so whilst maintaining responsibility for ensuring that he has contracted out to an appropriate body and with suitable controls and services in place, ie the function of providing the prison service remains with the MOJ.
12. A necessary result of this is that the MOJ must and should hold a considerable amount of information regarding the services being provided by the contractor, and in particular any matters over which the contractor can have no discretion as they are matters that fall within the Prison Rules or are subject to Human Rights restrictions. Conversely, there will also be matters that will fall within the complete discretion of the contractor.
13. The Information Commissioner considers that television access and channel provision are matters which are not subject to any overarching rules and therefore fall entirely to be decided by the contractor. As such the Information Commissioner considers that this information is outside the scope of that which the MOJ would be expected to hold in order to ensure the contractor is providing a suitable service.
14. The Information Commissioner noted that a particular clause in the copy of the contract provided to his office made provision for a telephone in every cell of HMP Dovegate, albeit that these may be controlled by PIN number such that the access is restricted.
15. He therefore asked the MOJ to explain why it could not respond to this part of the complainant's request. In reply the MOJ confirmed that, while there is a provision in the contract for any cell to have a telephone outlet (although this does not mean that each cell will necessarily have a telephone connected to this outlet), the decision about which cells and prisoners have telephone privileges is information which will only be held by the contractor.

16. The MOJ explained that if it held any information, it would be held by the Major Contract division or the Directorate of Probation and Contracted Prisons because these are the only departments in the MOJ which have direct contact with private prisons. The MOJ advised that these departments have confirmed that the MOJ does not hold any information on the number of prison cells which contain phones.
17. In summary, the Information Commissioner's view is that it will depend upon what information is requested as to whether the MOJ is the responsible authority and will hold the information. If the information falls within the MOJ's function to provide a prison service which complies with prison rules or other laws, then the MOJ should be the relevant authority. If however the information relates to an additional service entirely within the control/discretion of the contractor, then it may not be held by the MOJ and is not therefore accessible.
18. In coming to a conclusion upon this case the Information Commissioner has taken into account the nature of the information requested in this case, the relevant content of the contract between it and the contractor for HMP Dovegate and the explanations provided by the MOJ. The Information Commissioner considers on the balance of probabilities that the MOJ does not hold any of the requested information.

Right of appeal

19. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Signed

Jon Manners
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