

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2014

Public Authority: Her Majesty's Inspectorate of Prisons

Address: 6th Floor, Victory House

30-34 Kingsway

London

WC2B 6EX

Decision (including any steps ordered)

1. The complainant requested information about a prison inspection. Her Majesty's Inspectorate of Prisons ('HMIP') answered part of the request by sending the complainant a copy of the 2011 inspection report. It refused the remainder of the request on the basis that it was exempt under section 22 of FOIA (information intended for future publication).
2. The Commissioner's decision is that HMIP was correct in its handling of this request. Apart from question 1 which it answered by sending the 2011 report, all the information requested was exempt under section 22. He does not require HMIP to take any remedial steps.

Background

3. A report was published following what is described as an "*unannounced full follow-up inspection*" of Wandsworth Prison. This inspection took place from 28 February 2011 to 4 March 2011. The findings and recommendations of that inspection are detailed in the 2011 report, with a summary contained in pages 12-22. Progress made on recommendations since the previous report of 2009 is detailed on pages 23 to 25.
4. The Commissioner understands that all inspection reports include a summary of an establishment's performance against the model of a healthy prison. The four criteria of a healthy prison are:

Safety - prisoners, even the most vulnerable, are held safely

Respect - prisoners are treated with respect for their human dignity

Purposeful activity - prisoners are able, and expected, to engage in activity that is likely to benefit them

Resettlement - prisoners are prepared for their release into the community and helped to reduce the likelihood of reoffending.

5. Under each test, the inspectors make an assessment of outcomes for prisoners and therefore of the establishment's overall performance against the test. In some cases, this performance will be affected by matters outside the establishment's direct control, which need to be addressed by the National Offender Management Service.
6. The 2013 report which was published in November of that year is referred to as a "*report on an announced inspection of HMP Wandsworth.*" The inspection took place from 13 to 17 May 2013 and 10 to 14 June 2013.
7. A summary of how the prison is performing in 2013 against the four 'Healthy Prison' tests is set out on pages 11 to 18. The 2013 findings and recommendations follow with a summary of the recommendations and housekeeping points on pages 61 to 68. Appendix 2 (pages 71 to 86) details the progress made on recommendations since the 2011 report.

Request and response

8. On 4 July 2013 the complainant wrote to HMIP and requested information in the following terms; the full text of the request including parts 3-5 is set out in Annex A:

"With reference to the HM Prisons Inspectorate inspection at HMP Wandsworth in June 2013, under the Freedom of Information Act please let me have your response to the queries I make in the following numbered paragraphs.

1. *What previous poor findings the inspectorate was visiting to inspect with prior notice to the prison?*
2. *What findings the inspectorate made in June 2013? Please those [sic] in line with the previous poor findings stating date/s when they were made.*

NB. Please answer my queries specifically and not by sending some leaflet."

9. HMIP responded on 10 July 2013. It provided a copy of the 2011 prison inspection report in answer to part 1 of the request, and stated that the remaining parts (2-5) related to the findings of the 2013 prison inspection. HMIP said it would provide the complainant with a copy of this report once the full findings had been published, which it expected to be in October 2013.
10. On 26 July 2013 the complainant requested an internal review. HMIP wrote to the complainant on 14 August 2013 with the result of its internal review and maintained that section 22 applied to parts 2-5 of the request. HMIP said it considered that the 2011 report answered part 1 of the request, highlighting that details of previous recommendations which were being followed up were listed on pages 23-25 of that report.

Scope of the case

11. The complainant contacted the Commissioner on 29 August 2013 to complain about the way his request for information had been handled. He said that the 2011 report he had received did not, in his view, answer part 1 of his request as HMIP had claimed, and that the recommendations contained in it related to an inspection prior to 28 February-4 March 2011.
12. He asked the Commissioner to consider whether it was appropriate for HMIP to have sent him what he termed "*a voluminous irrelevant report instead of providing specific information requested*".
13. During the course of the Commissioner's investigation HMIP wrote to the complainant, sending him a copy of the 2013 inspection report, and addressing each part of his request in turn. It directed the complainant to the relevant parts of the report and, where the question was not specifically addressed in the report, it advised the complainant whom he should contact.
14. HMIP said it did not understand what was meant by the complainant's question 3(2) "*Concerning healthcare what findings the inspectorate made in relation to:- Treating the law/precedents found in the cases of **R on the application of Faizovas v Secretary of State for Justice [2009] EWCA Civ 373 and Mousif v France [2004] 38EHRR with utter contempt;***".
15. In response to question 3(3) HMIP also enclosed a Department of Health document which discusses the patient's right to choose the provider or place of their medical treatment. It said its understanding is that prisoners are exempt from this but that it would have to defer to the Department of Health on this as it is outside HMIP's remit.

16. As well as directing the complainant to the relevant sections of the report, HMIP sent the complainant a document entitled "Expectations" as part of its response to the complainant's questions about food.
17. On 7 January 2014 the Commissioner formed a preliminary view that HMIP had properly applied section 22 to the request and had responded to all parts of the request. He wrote to the complainant asking him to consider withdrawing his complaint on this basis. The complainant declined. Subsequently the Commissioner wrote again seeking clarification on those parts of the complainant's request which HMIP had not been certain about, as described above.
18. The Commissioner relayed the subsequent clarification to HMIP, who provided its further response on 17 March 2014. HMIP remained unclear about the complainant's healthcare questions.
19. The Commissioner has therefore considered whether HMIP has answered part 1 of the request and whether it was correct to rely on the exemption contained in section 22 of FOIA in responding to the remainder of the request.

Reasons for decision

Part 1 of the request

20. The complainant contended that part 1 of his request for "*What previous poor findings the inspectorate was visiting to inspect with prior notice to the prison*" had not been answered. He said it was "*a mumbo jumbo plethora of what HMIP considers to be a summary of a healthy prison. I am unable to identify clearly 'Poor findings' prior to June 2013 inspection and findings on June 2013 inspection*".
21. The Commissioner notes that the 2011 inspection was "*unannounced*" and that the 2013 inspection report was based on an "*announced*" inspection. His objective reading of this part of the request is that 'prior notice' would relate to the 2013 inspection given that it was an 'announced' inspection. However, after viewing both the 2011 and 2013 reports, the Commissioner is satisfied that the "*previous poor findings*" prior to 2013 are set out clearly in the 2011 report, best summarised in the Healthy Prison Summary (pages 12-22). He therefore considers that part 1 of the request has been answered and that the complainant has been directed to the location of the information he requested.

Parts 2-5 of the request

22. These parts of the request each specify that the complainant requires the "*findings the inspectorate made*". The Commissioner is satisfied that any such findings would necessarily be contained in their written up report. If the complainant's required response is not in that report then it is clear that no such related findings will have been made by the inspectorate on that occasion.

Section 22(1)

23. Section 22(1) provides that information is exempt from disclosure if it was held at the time of the request with the intention that it would be published at some future date. It is not a requirement of this exemption that the precise date of intended publication be determined; neither is it a requirement that the public authority itself must be intending to publish the requested information as it may be held with a view to publication by a third party. However, there must have been at the time of the request a clear and settled intention to publish and it must be, in any event, reasonable in all the circumstances to withhold the information from disclosure until the time of publication.
24. Section 22(1) is a qualified exemption, and so where a public authority is satisfied that it applies, it must nevertheless consider whether the public interest in applying the exemption is greater than the public interest in disclosing the information.
25. In order to determine whether section 22 was engaged at the time of the request the Commissioner has therefore considered the following questions:

Did HMIP intend to publish the information at some date in the future?

26. In its submission to the Commissioner, HMIP said that at the time of the request, it did have a settled intention to publish the HMP Wandsworth inspection report for 2013. It explained that all its reports are independent and written with the intention that each report will be published, referring to its HMI Prisons Inspection Guidance Manual on its website which details its "*clear and transparent publication process.*" Although HMIP advised that the manual is in the process of being updated, it sent the Commissioner Appendix 1 of the new manual which lists the various stages and timelines in the publication process.
27. The Commissioner is satisfied that there was a clear intention to publish the 2013 report at the time of the request.

Had HMIP determined a publication date?

28. At the time of the request, HMIP had advised the complainant that the expected publication date was October 2013. In this case, the Commissioner understands that the 2013 report was published on 12 November 2013.
29. The date that information is intended to be published does not need to be definite for the section 22 exemption to apply. What is important is that, at the time an information request is made, a settled intention to publish the information in the future exists. This has been discussed in paragraphs 26 and 27.
30. The Commissioner is satisfied that not having settled on a specific publication date would not prevent HMIP withholding the requested information under section 22.

In all the circumstances, is it 'reasonable' for HMIP to withhold the information until some future date?

31. The ICO's guidance on section 22 explains that there is some overlap between the factors public authorities should take into account in deciding what is reasonable, and those which are relevant in balancing the public interest test.
32. A public authority has, however, first to determine whether or not it is reasonable in all the circumstances to withhold the information in order to apply the exemption, before considering whether there is a public benefit in providing the information prior to publication. Public authorities should consider whether or not it is sensible, in line with accepted practices and fair to all concerned.
33. In considering what is reasonable in all the circumstances, a public authority may also wish to consider whether it is the right decision to manage the availability of the information by planning and controlling its publication.
34. In this case, the purpose of an inspection and associated report is to assess whether prisoners' wellbeing and welfare needs are being met, and to check whether previous inspection recommendations have been implemented.
35. HMIP explained that all its reports are accompanied by a press release and are often cited in the national media. For these reasons it said that it is imperative that HMIP is confident of its judgements and is accountable for subsequent consequences and follow-up. It said the various stages in the editorial and publication processes are there to ensure its judgements are "*robust, reliable and evidenced*" and that any

premature release of information before an account can be verified can be counter-productive, especially given the wider public and media interest in HMIP's reports.

36. The Commissioner acknowledges that this argument is a legitimate one for HMIP to make and, having also considered whether withholding the information is sensible, fair and in line with accepted practices, is prepared to accept that it is reasonable in all the circumstances for HMIP to withhold the information.

Was any other information held at the time of the request?

37. During his investigation the Commissioner made enquiries as to whether HMIP held any other information relevant to the complainant's request other than the 2011 and 2013 inspection reports. HMIP replied, explaining that its searches for information initially concerned a review of its reports. HMIP said "*Our interpretation of [the complainant's] questions indicated to us that this would be sufficient to provide him with the answers he sought.*"
38. HMIP added that in response to a subsequent FOIA request from the complainant about similar matters, it had sought further information from inspectors who had attended Wandsworth in 2013. Some had retained rough notes which had not been destroyed in line with its three month retention period. It provided the Commissioner with copies and said that it had details of the numbers of complaints contained within those documents in response to his subsequent request.
39. The Commissioner has reviewed this additional information (which should have been destroyed) and has concluded that it falls outside the scope of this request.
40. HMIP explained that any other information that was held should have been destroyed in compliance with its retention policy which is to dispose of any information received, before or during the inspection, three months after publication. No record is kept of documents destroyed and there are no statutory requirements upon HMIP to retain the requested information.
41. Given the three months retention period for information relating to the inspection, it is theoretically possible that HMIP may have held further information at the time the request was made; however, this would now have been destroyed in line with the retention policy. The Commissioner has therefore concluded, on the balance of probabilities, that no further information other than that contained in the inspection reports, and the small amount of information referred to in paragraph 38 above (which falls outside the scope of this request), is held by HMIP.

The public interest test

42. When a public authority wishes to withhold information under a qualified exemption such as at section 22, it must carry out a two-stage process. First, it must decide that the exemption applies to the requested information. Then it must carry out the public interest test. This means that it must decide whether the public interest is better served by maintaining the exemption (and so withholding the information) or by disclosing the information.
43. Having decided that the exemption under section 22 applied to the information that the complainant had requested, HMIP then went on to consider the public interest arguments.
44. HMIP argued that public affairs are conducted more effectively when authorities have a reasonable degree of control over the way information is made publically available, and are permitted to release it in a planned and managed way.
45. At the time of the request, HMIP said that the inspection report was still being compiled. As discussed at paragraph 35, the report attracts significant media interest and so it is essential that when the report is published it has been thoroughly reviewed and is accurate.
46. HMIP argued that the public interest is therefore served by it being able to publish a final report in a manner and form and at a time of its own choosing, in line with published publication guidelines.
47. In favour of disclosure, the Commissioner has considered the public interest in ensuring that the prison inspection process is seen to be transparent and accountable. However he considers that to a large extent this public interest will be served by the publication of the final report. He does not consider there to be any persuasive or specific public interest argument to justify publication in advance of the planned publication.
48. The Commissioner is therefore satisfied that the public interest in maintaining the exemption outweighs any public interest in disclosing the information.
49. Public authorities must have the freedom to determine their own publication timetables rather than have that timetable determined by individual requests for information. This allows them to appropriately manage the preparation, administration and context of publication.

Conclusion

50. At the time of the complainant's request, the Commissioner accepts that HMIP held the information in draft and unedited documents, a final version of which HMIP intended to publish in the future, and has now since published. He considers it is reasonable in all the circumstances for HMIP to have withheld the information until that future publication date. For these reasons, the Commissioner considers HMIP to have correctly applied the exemption under section 22 of FOIA to the information.
51. He also considers that, on balance, the public interest is best served by HMIP publishing the information in a planned way, ensuring an accurate final version of the inspection report. The Commissioner has therefore decided that the HMIP was correct to withhold the requested information at the time of the request.
52. Although the complainant considers that parts of his request have not been answered by publication of the 2013 report, the Commissioner is satisfied, having viewed the report, that some of the complainant's specific questions were not under consideration as part of that prison inspection so could not be responded to. He also considers that HMIP attempted to assist the complainant with other potential means of securing this information where it was appropriate.

Section 11

53. The Commissioner has next considered the complainant's complaint about requesting that the information should not be provided in the form of a "leaflet" and that the queries were answered "specifically". Whilst the complainant has not set out the means by which he would like the information, the Commissioner has considered section 11 of FOIA in order to address this part of his complaint.
54. Section 11 sets out the means by which an applicant making a request can ask for the information to be provided:

"Where, on making his request for information, the applicant expressed a preference for communication by anyone or more of the following means, namely -

- (a) the provision to the applicant of a copy of the information in permanent form or another form acceptable to the applicant,*
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and*
- (c) the provision to the applicant of a digest or summary of the information in permanent form acceptable to the applicant,*

the public authority shall so far as reasonable practicable give effect to that preference.”

55. The Commissioner's guidance¹ makes it clear that section 11 can only apply where a public authority has not applied an exemption. In this case, as HMIP relied on section 22 of FOIA, the Commissioner has concluded that section 11 does not apply.
56. He further notes that HMIP provided the complainant with details of where he could find the information relevant to his questions within the 2013 inspection report.

Other matters

57. Section 22 of FOIA does not require a public authority to provide a requester with a copy of the requested information once it has been published. In this case, however, albeit outside the remit of FOIA, HMIP had undertaken to provide the complainant with a copy of the 2013 inspection report once it was finally published on 12 November 2013. It did not do so. HMIP apologised to the complainant and explained that this was due to an administrative oversight, not an intention to refuse the information, and sent the complainant a copy of the 2013 report during the Commissioner's investigation.
58. It may also be useful to explain here that the FOIA only gives access to recorded information. Although the complainant may prefer to have specific answers to each part of his request, the FOIA only requires a public authority to provide a requester with any relevant recorded information which it holds. It is not required to create new information in order to provide a response.

¹

[http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/means-of-communicating-information-foia-guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/means-of-communicating-information-foia-guidance.pdf)

Right of appeal

59. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.
61. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

The complainant's complete request made on 4 July 2013 is detailed below:

"With reference to the HM Prisons Inspectorate inspection at HMP Wandsworth in June 2013, under the Freedom of Information Act please let me have your response to the queries I make in the following numbered paragraphs

- 1. What previous poor findings the inspectorate was visiting to inspect with prior notice to the prison?*
- 2. What findings the inspectorate made in June 2013? Please those [sic] in line with the previous poor findings stating date/s when they were made.*
- 3. Concerning healthcare what findings the inspectorate made in relation to:-*
 - (1) Prison violating Human Rights of prisoners while receiving exhausting and traumatic dialysis treatment;*
 - (2) Treating the law/precedents found in the cases of **R on the application of Faizovas v Secretary of State for Justice [2009] EWCA Civ 373 and Mousif v France [2004] 38EHRR** with utter contempt;*
 - (3) Contrary to the prisoners' right to receive medical treatment from NHS Trust of their choice compelling them to receive their required medical treatment only from the NHS Trusts chosen by the prison in whose doctors the prisoners have lost all trust;*
 - (4) Blackmailing the prisoners and threatening to let them die unless they agreed to receive their required medical treatment from the NHS Trust chosen by the prison;*
 - (5) Interfering with the medicines prescribed and supplied by the NHS Trust doctors of the prisoners' choice which do not happen to [sic] the NHS Trust chosen by the prison and not allowing the prisoners have [sic] their medicines.*
- 4. What findings the inspectorate made concerning common practice in the prison not to log complaints which they do not wish to be referred to the Ombudsman?*

5. *What findings the inspectorate made concerning food provided to the vegetarians in relation to:-*

- (1) Choice of food compared with non-vegetarians;*
- (2) Suitability to health conditions of the vegetarians whilst specifically required medical diet is manifestly denied to them.*

Please note that I am entitled to the requested information within 20 working days and do not have to disclose source and/or purpose of the information requested.

Please acknowledge receipt of my correspondence confirming when I am likely to receive a response.

NB. Please answer my queries specifically and not by sending some leaflet."