

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2014

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

Decision (including any steps ordered)

1. The complainant submitted a multi-part request to the Ministry of Justice (MoJ) requesting information relating to Category A prisoners. The MoJ cited section 12 of FOIA (cost of compliance exceeds the appropriate limit).
2. The Commissioner's decision is that the MoJ has correctly applied section 12.
3. He requires no steps to be taken as a result of this decision.

Background

4. According to the MoJ's National Offender Management Service categorisation of adult male prisoners,¹ category A prisoners are defined as:

¹ <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-40-2011-categorisation-adult-males.doc>

"Prisoners whose escape would be highly dangerous to the public or the police or the security of the State and for whom the aim must be to make escape impossible".

Request and response

5. Sometime between 30 January 2014 and 10 February 2014 the complainant wrote to the MoJ requesting information of the following description:

"1. Excluding those prisoners classified as 'provisional Category A' would you please tell me how many Category A prisoners in 2013 were recommended for a downgrade in classification to Category B by the Local Advisory Panel at

- a) HMP Long Lartin*
- b) HMP Frankland*
- c) HMP Full Sutton*
- d) HMP Wakefield*
- e) HMP Whitemoor*

2. With specific reference to each of the aforementioned prisons how many of the LAP recommendations were rejected by the Director of High Security?

3. Can the figures in 1 and 2 above be broken down into mainstream: VP [vulnerable prisoner] prisoners?

3. How many Category A prisoners were downgraded by the Director on his own initiative?

4. On average/on any fixed date how many prisoners were categorised as Category A in 2013?

4. With regard to Category A prisoners is there information available as to

- (a) length of time spent on Category A*
- (b) types of offences*
- (c) offenders' age*

5. If the answer to 4 is no is there any research ongoing/planned for such data to be made available?"

6. The MoJ responded on 5 March 2014. The Commissioner understands that the complainant may not have received the response until 17 March 2014.
7. The MoJ confirmed that it holds information that falls within the scope of the request but refused to provide it citing section 12(1) of FOIA (cost of compliance exceeds appropriate limit) as its basis for doing so. However, it did provide the complainant with some relevant information stating that it was released to him outside the scope of the FOIA and on a discretionary basis.
8. The complainant requested an internal review on 25 March 2014. The MoJ sent him the outcome of its internal review on 1 May 2014. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 14 May 2014 to complain about the way his request for information had been handled.
10. In bringing his complaint to the Commissioner's attention, he acknowledged that his request contained two questions:

"each of which were accidentally given the number '3'".
11. In that respect, the Commissioner notes that it appears that there were also two questions numbered '4'.
12. The complainant disputes *"that it would be too expensive"* to provide all the requested information.
13. For example, he told the Commissioner:

"I believe that if the management of the HSPG [High Security Prisons Group] is fit for purpose then it is inconceivable that for public protection purposes such information was not readily available. Category A prisoners are, allegedly, a danger to the public: the management of the HSPG who make downgrade decisions must surely know who they downgrade".
14. He also considered that the number of Category A prisoners designated VP or mainstream *"would be – indeed should be – a basic piece of data"*.
15. The complainant also criticised the MoJ's approach to his request, citing section 12 of FOIA and then providing relevant information on a discretionary basis.

16. The Commissioner considers the scope of his investigation to be the MoJ's application of section 12 to the requested information.
17. The Commissioner understands from the complainant that as the MoJ responded in the past to a very similar request, he was therefore expecting a similar response in this case. In the Commissioner's view, however, each case must be considered on its merits.

Reasons for decision

Section 12 cost of compliance

18. Section 12(1) of the FOIA states 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".

19. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.

20. Section 12(4) of the FOIA states 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".

21. In other words, when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied.
22. Regulation 5(2) of the Fees Regulations requires that the requests which are to be aggregated relate "to any extent" to the same or similar information

23. The Commissioner's guidance on requests where the cost of compliance exceeds the appropriate limit² acknowledges that public authorities can aggregate two or more separate requests. It also recognises that multiple requests within a single item of correspondence are separate requests for the purpose of section 12.
24. The Commissioner is satisfied that the individual components of the multi-part request in this case comprise separate requests for the purpose of section 12 and that the requests relate to the same or similar information.
25. He is therefore satisfied that the MoJ was entitled to aggregate the requests when considering whether complying would exceed the appropriate limit.

Would complying with the request exceed the appropriate limit?

26. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
27. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
28. In response to part of his request, the MoJ told the complainant:

"In this instance to provide you with the information we would be required to review the paper record of every "confirmed" Category A prisoner held within those five establishments. As the "confirmed" Category A population of each of those establishments is currently 712 individuals it would be reasonable to assume that this would be the minimum number of records that would need to be reviewed as part of that exercise".

²http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.pdf

29. In respect of the question about prisoners recommended for downgrade within each specified prison establishment, it told him that in order to establish how many of the prisoners were on main location or VP:

"we would have to manually trawl through their individual records to determine where they were located at the time their individual review took place. The data cannot be obtained by a simple click of a button".

30. Similarly it told him that, in relation to that part of the request about the length of time prisoners spend as Category A, the MoJ would have to manually collate the data. It said that, given the numbers of prisoners who are currently Category A and have been Category A in the past, that would mean that that part of his request would "far exceed" the cost limit.

31. As is his practice in a case such as this, during the course of his investigation the MoJ was asked to provide the Commissioner with:

"a detailed estimate of the time/cost taken to provide the information falling within the scope of this request".

32. In its substantive submission, the MoJ provided the Commissioner with arguments in support of its citing of section 12. For example it confirmed that manual searching of prisoner files is the only method of gathering the requested information relating to Category A prisoners broken down into VP and general population. It estimated that it would take approximately 25 minutes to locate that information for each prisoner and that 25 x 37 (the number of prisoners) equals approximately 16 hours. It also provided estimates for the time required to conduct effective searches for the other requested information. For example it said that at a cost of £25 per hour, the cost for that part of the request relating to the length of time a prisoner has spent as Category A to be approximately £6450.

33. With respect to some parts of the request, the MoJ acknowledged that the information could be retrieved within the limit set by the legislation. In that respect, the MoJ confirmed that it considered that the request as a whole, aggregated together in line with section 12(4) of FOIA exceeds the cost limit as set out in the FOIA.

34. The Commissioner recognises that there is no statutory requirement under section 17 for the refusal notice to include an estimate of the costs involved, or any other explanation of why the cost limit would be exceeded. However, in the Commissioner's view, it is beneficial to a public authority to do so because, for example, it may enable the requestor to assess the reasonableness of the estimate.

35. In this case, although the MoJ told the complainant that it considered that complying with the request would exceed the cost limit, and mentioned some numbers, the Commissioner is disappointed to note that it failed to provide the complainant with an estimate of the actual work involved in complying with his request.
36. In the absence of an estimate of the work involved, or a detailed explanation as to why the exemption applies, the Commissioner considers it understandable that the complainant finds the MoJ's response unsatisfactory.
37. However, from the evidence he has seen during the course of his investigation, and in consideration of the aggregation of the multiple parts of the request, the Commissioner is satisfied that the MoJ has now provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and the MoJ is not required to comply with the request.

Section 16 advice and assistance

38. Where a public authority claims that section 12 is engaged, it should, where reasonable, provide advice and assistance to help the requestor to refine the request so that it can be dealt with under the appropriate limit.
39. Paragraph 14 of the section 45 Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

40. In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:
 - either indicate if it is not able to provide any information at all within the appropriate limit; or
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requestor to make a refined request.

41. The Commissioner notes that while the MoJ told the complainant it considered that his request as a whole is covered by section 12, it also told him that it may have been able to release some information where section 12(1) would not apply.
42. However, in this case the MoJ confirmed that rather than clarify this with the complainant it had, outside the scope of the FOIA, disclosed discretionary information which was readily available within the cost limit. It explained to the Commissioner that it had provided that information in order to be of assistance to the complainant.
43. The Commissioner acknowledges that the MoJ provided the information on a discretionary basis in good faith. However, he reminds the MoJ that it should offer advice and assistance to applicants directly, during its handling of their requests, and not presume what will be of use to them.

Right of appeal

44. 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

45. 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.
46. 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