

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 July 2015

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

#### **Decision (including any steps ordered)**

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1. The complainant requested information about oral hearings for prisoners from the Ministry of Justice (the 'MOJ') who provided some of the information requested, but withheld the remainder under section 40(2) of the FOIA, the exemption for personal information.
2. The Commissioner's decision is that, based on the information the MOJ provided to him during his investigation, it has given an incorrect figure to the complainant in response to part one of the request. He also finds that section 40(2) is not engaged in respect of part two of the request.
3. The Commissioner requires the MOJ to take the following steps to ensure compliance with the legislation:
  - issue a fresh response to part one of the request set out in paragraph 5;
  - issue a fresh response to part two of the request set out in paragraph 5, which does not rely on section 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background

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5. The Commissioner understands that Prison Regulations require that the security status of a Category A prisoner should be reviewed annually, and that this review allows such prisoners to comment on redacted reports which are considered by a Local Advisory Panel ('LAP'). The prisoner may submit representations but is not permitted to attend the LAP. A recommendation is made by the LAP which is then considered by the Category A team or the Director of High Security at the MOJ.
6. On 23 July 2014, following the judgment of the Supreme Court in *Osborne, Booth and Reilly*, the MOJ was obliged to make amendments to the regulations to recognise that, in some circumstances, prisoners should be allowed to attend the review process, known as having an 'oral hearing'.

## Request and response

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7. On 4 February 2015 the complainant wrote to the MOJ and requested information in the following terms:
  1. *How many applications for oral hearing for Category reviews have been granted since the amendments to PSI 08/2013 were made on 23 July 2014?*
  2. *Is there data readily available as to how many Category A reviews have resulted in a positive recommendation following an oral hearing?*
  3. *Is there data readily available as to how many Category A reviews that have resulted in a positive recommendation following an oral hearing have subsequently been reversed by the Deputy Director of Custody/Cat A Team?*
  4. *PSI 08/2013 is ambiguous as to the procedure to be followed where an oral hearing has been granted. Does the oral hearing take place at what is now the LAP stage?*
  5. *Does the Deputy Director of Custody/Cat A Team still retain a veto following a positive recommendation at an oral hearing?"*
8. On 26 February 2015 the MOJ (specifically, the High Security Prison Group ('HSPG') in the National Offender Management Service ('NOMS')) responded. It provided some information within the scope of the

request, but withheld the information in scope of part two, citing section 40(2) of FOIA relating to personal information.

9. The complainant requested an internal review on 28 February 2015, raising concerns about the responses to parts two and four. The MOJ responded on 20 March 2015 upholding its position in relation to question two, but it did not deal with his concerns about question four.

## Scope of the case

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10. The complainant contacted the Commissioner on 2 April 2015 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider why the MOJ had engaged section 40(2) in relation to the number of Category A reviews resulting in a positive recommendation following an oral hearing, whereas the MOJ had, in response to a previous request from the complainant, disclosed the numbers of Category A reviews which resulted in a positive recommendation following a LAP hearing by prison establishment. He also highlighted that concerns about question four of his request had not been addressed at the internal review.
11. The Commissioner has considered whether the MOJ has correctly relied on section 40(2) to withhold the information requested in question two and whether question four has been answered.
12. In relation to question four, the MOJ told the Commissioner that due to a scanning error at the internal review stage only half of the request was visible, something that was not noticed. It said that the original response given was:

*"The decision to grant an oral hearing is made at the Category A panel by the Deputy Director of Custody for High Security, this panel follows the LAP stage."*

13. The MOJ said that in his request for an internal review the complainant rephrased his question as below:

*"What I did not ask was when the decision to grant an oral hearing is made and even that response was incorrect. The Administrative Court can order the Secretary of State to hold an oral hearing.*

*I asked when – at what stage in the Category A review process – does the oral hearing take place. At the LAP stage or at the review by the Category A Team?"*

14. The MOJ advised that if this clarification had been seen during the internal review process it would have clarified the point with the following explanation:

*"Once the decision to grant an oral hearing has been made the hearing will be scheduled to take place during the next DDC visit to the prison where the prisoner in question is being held.*

*Although the Administrative Court can order the Secretary of State to hold an oral hearing this is not normal practice and the decision to grant an oral hearing will in almost all instances be made by the Deputy Director of Custody at the Category A Panel."*

15. The Commissioner considers that the clarified response answers question four. As the complainant has not complained about questions one, three or five, the Commissioner has not included them as part of his investigation. He has therefore determined whether section 40(2) was properly applied to question two of the request.

## **Reasons for decision**

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### **Error by MOJ**

16. The MOJ has provided responses to parts one, three, four and five of the request. In respect of part one, it told the complainant that there have been 11 oral hearings. However, from the information provided to the Commissioner, he notes that this figure includes oral hearings from 2012 and 2013. The complainant has only requested details of the numbers of such hearings since 23 July 2014. The Commissioner therefore requires the MOJ to issue a fresh response in respect of part one of the request.

### **Section 40(2) – personal information**

17. Part two of the complainant's request asks whether there is data readily available as to how many Category A reviews have resulted in a positive recommendation following an oral hearing. The MOJ refused to provide this information on the basis of section 40(2), personal information.
18. It told the Commissioner that it had withheld the information due to the number of Category A prisoners held and its belief that the low figures could lead to the identification of individuals. The MOJ also said that as the complainant is a Category A prisoner himself, that there are only eight Category A prisons, and the number of positive recommendations is low, it had decided that the complainant may *"have other information not available to the general public that would aid 'jigsaw' identification*

*and permit him to build up a matrix of information which could be used to narrow down specific individuals”.*

19. The complainant, however, told the Commissioner that due to the changes in prison procedure that inevitably follow a positive recommendation, everyone in the prison in which a Category A prisoner has been downgraded to a lower risk status would know that that prisoner was no longer a Category A prisoner. Further, he contended that all Category A prisoners have a highly visible red cell door card outside their doors for all prisoners and officers to see, and that, following a positive recommendation, the red cell door card is then changed for a white cell door card.
20. In addition, the complainant submitted evidence to show that in previous years (2012, 2013 and 2014), in response to earlier requests, the MOJ has provided actual numbers of positive recommendations as a result of the LAP, both made and approved by prison establishment, even where this figure has been five or less. He highlighted that in 2013 there was only one prisoner at Frankland Prison who had received a positive recommendation which conflicts with the MOJ's refusal to disclose how many positive recommendations had been made following an oral hearing.
21. Further the complainant pointed out that he has not requested the locations of any prisoners who have received a positive recommendation as part of his current request; he has simply asked for the overall numbers.
22. Section 40(2) of the FOIA provides an exemption from disclosure of information which is the personal data of a third party and where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (the 'DPA') or in section 10 of that Act.
23. In order to rely on section 40(2) the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

*" ...data which relate to a living individual who can be identified*

*a) From these data, or*

*b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

*Is the information personal data?*

24. The first question for the Commissioner to consider is whether the requested information is personal data as defined in section 1 of the DPA.
25. The MOJ has argued that the information is personal data because disclosure of the overall number of positive recommendations following an oral hearing could lead to the identification of individuals, given the low number concerned.
26. The Commissioner is not persuaded by this argument. The statistical information that has been requested is not personal data to the extent that the individuals concerned can be identified by someone who possesses those figures alone. For example, were the actual figure 'three' or 'ten', this would not assist in the identification of any inmate and which category A prison they were in.
27. The main thrust of the MOJ's argument is that the disclosure of small figure statistics could motivate a requestor to try and seek out other information in order to identify the individuals concerned. Although it is not the small figure statistic itself which identifies the individuals, the MOJ expressed concern that other information which may be available to a motivated requestor, specifically within the prison environment, may result in the identification of individuals. However, such information has not been requested and this argument therefore fails at this stage – although it may become relevant were further related requests received in the future.
28. The Commissioner also notes that the complainant has indicated that prisoners themselves are already able to identify those inmates who have been re-categorised because of a card system on the cell doors. The Commissioner has not established with the MOJ whether or not this is the case at such establishments as he does not think it is necessary for him to do so in order to reach a conclusion in this case.
29. Although the Commissioner acknowledges that it is a viable scenario that the disclosure of the withheld information may motivate an individual to try and find out further information, he does not believe that this means that the requested information is, in itself, personal data. As the MOJ itself has acknowledged, an individual cannot be identified from the withheld information alone.
30. The Commissioner does not consider that the requested information constitutes personal data. As a result, he finds that section 40(2) is not engaged.

## Right of appeal

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31. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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**  
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