

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2016

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

Decision (including any steps ordered)

1. The complainant requested information about the provision of kosher food for Orthodox Jewish prisoners. The Ministry of Justice (the 'MOJ') provided the recorded information it held relevant to the request. During the investigation, the MOJ confirmed it should instead have relied on section 21 of FOIA (information accessible to applicant by other means) for parts 1, 2, 3 and 5 of the request, because it said the information requested is available to the complainant in the prison library. For part 4, it provided the information it held in recorded form and also some discretionary information following enquiries with the Head of Catering at the specified prison.
2. The Commissioner's decision is that, on the balance of probabilities, the MOJ has provided all the recorded information it holds relevant to the request, where that information is not covered by section 21 of FOIA. He finds that the MOJ properly relied on section 21 because the information is reasonably accessible.
3. However, the MOJ failed to provide its refusal to respond within the statutory 20 working days framework and thereby breached section 17(1) of FOIA. He does not require the MOJ to take any remedial steps.

Background

4. The Commissioner understands that the arrangements for the provision of kosher food to Orthodox Jewish prisoners is set out in Prison Service Instruction ('PSI') 44/2010, which is annexed by the Catering Operations Manual.

5. The purpose of PSIs is to establish a national policy across the prison estate in relation to matters such as food provision, so that the need for each individual prison to formulate its own policies and approach is eliminated. Each prison is required to deliver the minimum standards set out in the PSI.

Request and response

6. On 20 July 2015 the complainant wrote to the MOJ and requested information in the following terms:

- "1. The full details of the instructions and procedure whereby any prisoner who the Ministry of Justice has agreed must be treated as a strictly observant Orthodox Jew must nonetheless arrange for his shul to provide the appropriate kosher food as set out on paragraph 3.24 of the Catering Operations Manual?"*
- 2. On what authority or in what Prison Service Instruction has any such instruction/provision been made for any prisoner to have food brought in from outside the prison?"*
- 3. The relevant instructions given to Security departments in the High Security estate in order that they may comply with the practice described in (1) above.*
- 4. What provision is currently being made in compliance with paragraph 3.24 of the Catering Operations Manual for strictly Orthodox Jewish prisoners to receive appropriate kosher food from the prison?"*
- 5. What arrangements are in place for a Foreign National prisoner who is a strictly Orthodox Jew to be provided with appropriate kosher food from the prison?"*

7. The MOJ responded on 5 October 2015. It provided some information within the scope of the request, quoting relevant sections of the Catering Operating Manual, but denied holding some of the requested information. It stated:

"Establishments are required to provide a range of meals that meet the needs of the prison population. Standards of provision which establishments must meet are set out in a Prison Service Instruction (44/2010) a copy of which is normally available within the prison library. To assist you I have copied the relevant guidance issued to prisons regarding religious diets specifically those who require a Kosher meal. Paragraph 3.24 deals specifically with your request and shows

the route to follow for strictly and ultra orthodox Jews to obtain additional provision."

8. The complainant requested an internal review on 13 October 2015. The MOJ provided its internal review late on 6 January 2016. It upheld its original decision but added that the Head of Catering had been consulted at the relevant prison, and acknowledged the delayed response. It also clarified that no further recorded information about kosher food was held at the named prison, other than that set out in the Catering Operations Manual.

Scope of the case

9. The complainant contacted the Commissioner on 3 February 2016 to complain about the way his request for information had been handled. He complained that the MOJ's responses had not answered his request and were little more than a 'cut and paste' from the Catering Operation Manual, to which he has access.
10. The MOJ confirmed that the request had been handled by the National Offender Management Service ('NOMS'), which falls under the remit of the MOJ. NOMS' initial response had included the following statement:

"I can confirm that the department does hold some, but not all, of the information that you have asked for as there is no requirement for this information to be centrally held, but have provided what we do hold."
11. During the investigation, the MOJ clarified that the above statement had been included in error due to a misunderstanding by the drafter of the response regarding the definition of 'held' information. It acknowledged that the erroneous statement may have led the complainant to consider that further information was held. The MOJ confirmed that all the information held had, in fact, been provided in response to all parts of the request.
12. At this stage, the MOJ also advised the Commissioner that NOMS had stated that section 21 should have been applied to parts 1, 2, 3 and 5 of the request. The Commissioner queried whether the MOJ or NOMS had written to inform the complainant about its late reliance on section 21. Subsequently, NOMS issued a further response to the complainant advising him of its wish to rely on section 21 for the request apart from part 4.
13. The MOJ, via NOMS, also clarified that it had interpreted part 4 of the request as being solely about the named prison and explained that the general approach to provision is set out in PSI 44/2010 and the

accompanying Catering Operating Manual. As regards meal provision at Her Majesty's Prison ('HMP') [location redacted], enquiries confirm that, when required, boxes of individual prepared meals are purchased from its nominated and approved supplier of kosher meals and appropriate meals are issued to those who have pre-selected a kosher meal option.

14. The Commissioner has therefore considered whether, on the balance of probabilities, any further information other than that located in PSI 44/2010 and the Catering Operations Manual is held, and whether the MOJ has properly relied on section 21 for parts, 1, 2, 3 and 5 of the request.

Reasons for decision

Section 1 – information not held

15. 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."

16. The task for the Commissioner here is to determine whether, on the balance of probabilities, the MOJ holds any further information relevant to the request which it has not disclosed to the complainant. Applying the civil test of the balance of probabilities is in line with the approach taken by the Tribunal when it has considered the issue of whether information is held in past cases.
17. The MOJ advised that it had requested information specific to HMP [location redacted] from the establishment and that the Head of Catering at the relevant prison had been spoken to directly.
18. It confirmed that all other information requested was included in PSI 44/2010, which is the instruction which sets out NOMS policy relating to food provision. It said this policy is supported by the Catering Operating Manual, which is an annex to PSI 44/2010. The MOJ explained that every prison has to deliver the minimum services specified in the documents detailed above.
19. The MOJ, via NOMS, confirmed that no relevant recorded information had been destroyed or deleted. It said that all the information held is

relevant to its business purpose and that nothing further is required to be held.

Conclusion

20. The Commissioner considers that the MOJ approached the appropriate member of staff at the named prison, ie its Head of Catering, who confirmed that no further information is held. In addition, given that the instructions for the provision of kosher food to Orthodox Jewish prisoners is set out centrally for all prisons to follow, in PSI 44/2010, annexed by the Catering Operating Manual, the Commissioner considers it reasonable that, on the balance of probabilities, the specified prison does not hold any further recorded information relevant to the request.

Section 21 – information accessible to applicant by other means

21. In this case, the MOJ relied on section 21 during the Commissioner's investigation for all parts of the request apart from 4. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
22. Section 21 provides an exemption for information that is already reasonably accessible to the applicant. It is an absolute exemption and as such no public interest test needs to be applied. Section 21(1) of the FOIA states that:

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."
23. This means that where a complainant is reasonably able to obtain the information from another source then the information is exempt from disclosure under the FOIA.

Is the information reasonably accessible to the applicant?

24. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA. Additionally, the public authority must hold the requested information in order to be able to claim section 21.
25. So to assess whether section 21 of FOIA has been correctly applied will depend on whether or not the requested information is reasonably accessible to the applicant who has requested it. Information is only reasonably accessible to the applicant if the public authority:

- knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the public authority must be able to provide directions to the information.
26. In this case, the PSIs are publicly available online; however, on this occasion, the complainant is a prisoner who does not have access to computers. Nevertheless, the MOJ confirmed that PSIs are available to prisoners via the prison library.
27. It is clear from the complainant's correspondence with the Commissioner that he can access, and indeed has accessed, the relevant PSI and associated Catering Operations Manual.

Conclusion

28. The Commissioner has concluded that the MOJ was entitled to rely on section 21 of FOIA in relation to parts 1, 2, 3 and 5 of the request, because the requested information is reasonably accessible to all applicants, either in the prison libraries or online.

Procedural issues – section 17(1) breach – late refusal notice

29. Section 1(1) of FOIA states:

(1) 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.

30. Section 10 of FOIA states:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

...

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

31. Section 17(1) of FOIA states:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

32. If, as in this case, the MOJ decides that information should be withheld it has an obligation to provide a requester with a refusal notice within 20 working days of receipt of the request. The MOJ failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of FOIA.

Other matters

33. As well as finding above that the MOJ is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the MOJ should evidence from other cases suggest that there are systemic issues within the MOJ that are causing delays.

34. 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', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, 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 57 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

35. 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

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

36. 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.
37. 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

Carolyn Howes
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