

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2020

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

Decision (including any steps ordered)

1. The complainant requested information about the recruitment and retention of prison officers. The Ministry of Justice ("the MoJ") refused the request because it estimated that the cost of complying would exceed the appropriate limit.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 12 of the FOIA to refuse the request. She also finds that the MoJ discharged its section 16 duty to provide reasonable advice and assistance.
3. The Commissioner does not require any further steps.

Request and response

4. The complainant originally wrote to the Lord Chancellor on 18 August 2019 to express some broader concerns he had about the management of prisons. However, as part of that letter he requested recorded information in the following terms:

"[1] Firstly I would like to know the prison population, amount of prison officers, amount of assaults on prison officers and the amount of prison officers off on long term sick for the following years

2010, 2012, 2014, 2016 and 2018

"[2] Secondly as the amount of prison officers has decreased and the prison population has increased for those years I would like to know how many Prison Service Orders (PSOs) or Prison Service Instructions (PSIs) have been issued cutting the amount of prison officers required for specific duties....."

"[3] ...A couple of years ago the MoJ made great play of announcing 2500 more staff being employed to ease pressure on current prison staff, will you state that during the interview, recruitment, training and placement of these new staff at establishments how many existing staff left in that period and how many of those new staff are still in post to date."

5. On 20 September 2019, the MoJ responded. It refused to comply with the request and relied on section 12 of the FOIA to do so. It also highlighted where some information, relevant to element [1] of the request, could be found.
6. The complainant sought an internal review on 11 November 2020. The MoJ completed its internal review on 5 December 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 2 January 2020 to complain about the way his request for information had been handled.
8. The complainant put forward some arguments about the public interest in disclosure of the requested information. Unfortunately, for reasons which will be discussed below, the Commissioner has not been able to consider these arguments.
9. The scope of this decision notice is to consider whether the MoJ has reasonably estimated that the cost of compliance would exceed the appropriate limit.

Reasons for decision

Section 12 – Cost of Compliance Exceeds Appropriate Limit

10. Section 1(1) of the 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.*

11. Section 12 of the FOIA states that:

- (1) 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.*
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*

12. The "Appropriate Limit" is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") and is set at £600 for a public authority such as the MoJ. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

13. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent in:

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

14. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be "sensible,

realistic and supported by cogent evidence".¹ The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

The MoJ's position

15. At the outset of her investigation, the Commissioner wrote to the MoJ asking it to set out its estimate of the cost of complying with the request and set out the tasks that would be required.

16. By way of background, the MoJ explained that:

"In November 2016 the government committed to an increase of 2,500 prison officers by the end of 2018. This 2,500 is a net figure so is the result of subtracting the number of prison officers leaving the service from the number of new joiners. Therefore, there is not a group of 2,500 prison officers who can be directly identified as being the group to which the figure refers and so the question of how many of 'those' new staff are still in post is somewhat misconceived. There were however additional recruitment campaigns launched in this period in order to achieve the government target. We therefore determined that the best way to address [the complainant]'s request was to consider it as a request for the number of prison officers recruited as part of these additional recruitment campaigns who are still in post. There is no other group which alone constitutes the 2,500 additional prison officers referred to in the government target.

"The above points were explained to [the complainant] in the Internal Review response and he was invited to make a new request specifying an alternative group to which he would like his request to refer if this was inappropriate. He has not made such an alternative request so we are of the view that this was an acceptable interpretation of his request."

17. In order to satisfy the element [3] of the request, the MoJ argued that:

"In order to obtain the information requested by [the complainant], we would be required to:

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

- 1) *Locate and retrieve records of all recruitment campaigns carried out between November 2016 and December 2018;*
- 2) *Extract from these the information necessary to determine whether the campaign was routine or additional;*
- 3) *Locate and retrieve the records of all successful candidates from the additional campaigns;*
- 4) *Extract from these any personal information which could be used to link the candidate to a current personnel record; and*
- 5) *Manually examine the personnel records of over 10,000 new staff recruited in this period to identify those which match with the information obtained at (4).*

"As detailed above, there is no common identifier between the recruitment and personnel databases that would allow Step 5 to be carried out electronically. This matching process would be reliant on examining a range of personal characteristics available in the recruitment records which could be used to identify a corresponding person in personnel records. Such information may vary between candidates or be located in a range of documents."

18. Whilst the MoJ explained that it had not calculated a complete estimate of the cost of complying with the whole request, it noted that:

"Our cost estimate is based on the process in Step 5, which would involve the manual examination of over 10,000 individual records... For this exercise to be possible within the cost limit, it would only allow eight seconds to examine each record. We believe it is sufficiently realistic and sensible to assume that a detailed examination of a personal record to cross-reference with relevant candidate information would take more than eight seconds per record."

The complainant's position

19. The complainant was keen to stress that he had been motivated to make his request because of his concerns about the safety of prison officers – one of whom happened to be his son.
20. He noted that publicly available statistics indicated a significant loss of experienced prison officers and argued that this loss presented a safety risk to the current staff. Furthermore, the complainant argued, what he felt was mismanagement on behalf of the MoJ was contributing to low morale amongst prison staff.

The Commissioner's view

21. The Commissioner considers that complying with the request would exceed the appropriate limit.
22. Whilst the Commissioner does not doubt the importance of the complainant's concerns or the sincerity with which he has expressed them, they are unfortunately not matters which she is permitted to take into account in considering whether the MoJ is entitled to rely on section 12. A request either will exceed the cost limit or it will not. If a request will exceed the cost limit, that is the end of the matter – there is no public interest test which the Commissioner is required to consider.
23. Whilst the complainant has correctly pointed out that even if his request might exceed the appropriate limit, the FOIA does not *prevent* the MoJ from responding if it wished to do so, the fact remains that the MoJ is not *obliged*, by the FOIA, to respond to such a request. Nor does the Commissioner consider that it would be reasonable to draw an adverse inference about the MoJ's concern for prison officers, simply because it has relied on an exemption when it is entitled to do so.
24. Turning to the MoJ's submission, the Commissioner considers that the MoJ adopted an interpretation of the request which appears more complicated than would be suggested by a plain English reading of the complainant's original letter.
25. The MoJ considered that the only prison officers falling within the scope of the request would be those who joined as a result of specific recruitment campaigns linked to the Government's target. The Commissioner considers that a more intuitive interpretation of the request would be to consider the length of service of *all* new staff during the period, regardless of which recruitment campaign they might have been a part of.
26. However, the Commissioner also notes that the MoJ set out, in its initial response to the complainant, a detailed explanation of its interpretation of his request. The MoJ also invited the complainant to submit a refined request for data on the length of service of all staff recruited in the relevant period. The complainant has not, either in his request for an internal review, or in his correspondence with the Commissioner, suggested that the MoJ's interpretation of his request was incorrect.²

² The complainant did dispute that the 2,500 announcement should have been a gross increase and not a net increase – he argued that the MoJ should not have been allowed to include figures for staff who had been retained. The Commissioner is satisfied that

The Commissioner is therefore happy to accept that the MoJ adopted the correct objective reading of the request.

27. Having accepted that answering element [3] of the complainant's original request would require a new prison officer to be linked to a specific recruitment campaign, the Commissioner is therefore bound to accept that identifying and extracting the relevant information could not be done without a manual trawl of personnel records.
28. The Commissioner also notes that she is not required to consider the way that a public authority *ought* to hold particular information – only the way that the information *is*, as a matter of fact, recorded.
29. Trawling through ten thousand personnel files without exceeding the appropriate limit (ie. within 24 hours) would leave an average of under nine seconds for reviewing each individual file. This would not include any time spent either responding to the other two elements of the request or on identifying the relevant information from the recruitment campaigns.
30. The Commissioner considers that nine seconds would be an unreasonable amount of time for the MoJ to extract all the relevant information from a personnel file. She therefore concludes that the MoJ has made a reasonable estimate that the cost of complying with the request would exceed the appropriate limit.
31. As complying with the request would exceed the appropriate limit, the MoJ was entitled to rely on section 12 of the FOIA to refuse it.

Advice and Assistance

32. The FOIA Code of Practice requires a public authority, relying on section 12 to refuse a request, to provide reasonable advice and assistance to the requestor to help them bring their request within the cost limit.
33. In this case, the MoJ's initial response identified the element of the request which would be costly to answer and explained why this was the case. It then offered the complainant an alternative version of his request which it thought it might be able to answer. Finally, it pointed the complainant towards publicly available information which (it further

information relating to retained staff was not included in the MoJ's estimate of the cost of complying with the request and therefore this argument has not been considered further. The accuracy of the earlier government announcement would not fall within the scope of this complaint.

explained in its internal review) would be helpful either in answering the first element of his request or in further refining the costly element of his request.

34. The Commissioner notes that the advice and assistance that will be “reasonable” in any given circumstance will depend on the individual facts of the case. However, in this particular case, she considers that the advice and assistance the MoJ offered to the complainant, to help him refine his request, was reasonable. She therefore considers that the MoJ discharged its section 16 duty to provide advice and assistance.

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@justice.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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF