

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to a review of prison designed accredited programmes. The Ministry of Justice (the 'MOJ') provided some of the requested information and an explanatory sentence about the forthcoming review. In response to the complainant's request for an internal review, the MOJ clarified its position and stated that no information was held for that part of the request (part 3). The complainant's complaint focusses only on part 3 of his request.
2. The Commissioner's decision is, on the balance of probabilities, that the MOJ does not hold the information requested at part 3 of the request.
3. No steps are required as a result of this notice.

Request and response

4. On 13 July 2021, the complainant wrote to the MOJ via the WhatDoTheyKnow.com website and requested information in the following terms:

'On 12.7.21, in response to a written question from Tonia Antoniazzi MP about the availability of offending behaviour programmes, Prisons Minister Alex Chalk MP replied: "A strategic review of all HMPPS [Her Majesty's Prison and Probation Service] designed accredited programmes is underway."

Could you please tell me:

What are the start date and anticipated end date of this review?
Who is leading the review?

Please could you provide me with any scoping note or remit which sets out the purpose of the review or what the review will be considering - for example, any briefing note prepared for ministers to explain what is happening.'

5. The MOJ responded on 30 July 2021. It provided the information for parts 1 and 2 of the request. For part 3, the MOJ said:

"We are exploring a refined Accredited Programmes (AcPs) suite to increase our focus on quality in delivery, enable improved evaluation and, ultimately, seek to improve the impact on reduced reoffending rates. Ministers will be sighted on this work as it progresses."

6. The complainant requested an internal review that same day in respect of part 3 of his request, contending that briefing or scoping notes must exist. Following its internal review, the MOJ wrote to the complainant on 24 August 2021. It explained that it did not hold the requested information for part 3 of the complainant's request. Specifically, it said:

"In relation to part 3, in our original reply, we stated that HMPPS is exploring a refined Accredited Programmes (AcPs) suite to increase our focus on quality in delivery, enable improved evaluation and, ultimately, seek to improve the impact on reduced reoffending rates. We then confirmed that Ministers will be sighted on this work as it progresses.

Having reviewed this and consulted again with the HMPPS Interventions Team I am satisfied that this information was correct, however, the original reply should have stated clearly that the MOJ 'does not hold' the information for this part of you [sic] request. I am, therefore, happy to correct that and replace the original reply with the following:

The MOJ does not hold any information in the scope of your request. This is because there is no legal or business requirement for MOJ to do so. It may help if I explain that we are exploring a refined Accredited Programmes (AcPs) suite to increase our focus on quality in delivery, enable improved evaluation and, ultimately, seek to improve the impact on reduced reoffending rates. Ministers will be sighted on this work as it progresses."

Scope of the case

7. The complainant contacted the Commissioner on 24 August 2021 to complain about the way part 3 of his request for information had been handled. He submitted the following grounds of complaint:

'We don't believe the MOJ/HMPPS is telling the truth when it states that it does not hold the information we requested. We asked for "any scoping note or remit which sets out the purpose of the review or what the review will be considering - for example, any briefing note prepared for ministers to explain what is happening". If this review is happening, there must be some written note within the MOJ stating what is being reviewed. The MOJ makes a point, in both its replies, of stating that ministers "have not yet been sighted" on the work. This is clearly untrue, as the reason we're aware of it - as explained in the initial request - is a statement made by Prisons Minister Alex Chalk MP informing MPs of its existence. However, regardless of what level of detail Mr Chalk or his fellow ministers have or haven't been given, our request wasn't for the briefing note ministers saw. It was for any scoping note or remit, FOR EXAMPLE any briefing note prepared for ministers. So even if ministers were never told, our request stands, and has neither been addressed nor complied with.'

8. In terms of resolving his complaint, the complainant submitted the following:

"The public body could start by describing what documents it does hold that in some way meet our request for a 'scoping note' or 'briefing note' of this project currently underway, rather than trying to be over-specific about what we've requested, and saying it doesn't exist. Or if the MOJ is genuinely maintaining that nothing was ever written down about this project, it should state that barely-credible claim explicitly."

9. The Commissioner relayed the above grounds of complaint and suggested resolution to the MOJ and asked it to consider them when responding to his investigation.

10. The MOJ provided its investigation response on 18 July 2022. It explained:

"Having held further discussions with the Interventions Team following receipt of your letter, I can confirm that the information we gave in relation to part 3 in our original reply and in our internal review response was correct in both cases.

At the time of the request, the strategic review was in its preliminary phase. The measures it had been necessary to take during the pandemic meant that it had not been possible to progress the review as quickly as originally hoped. Scoping had not been completed and no proposals had been put to Ministers.”

11. The MOJ also made reference to a background note providing advice to Ministers in relation to the Parliamentary Question referred to in the request, and subsequently provided a copy of the note, so that the Commissioner could assure himself that the information it contained was not within the scope of the request.
12. The Commissioner has considered whether, on the balance of probabilities, the MOJ holds any information requested at part 3 of the request.

Reasons for decision

Section 1 – general right of access

13. Section 1(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.”

14. The Commissioner is mindful that when he receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the ‘balance of probabilities’ whether information is held.
15. The Commissioner will consider the complainant’s evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is

only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

16. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the MOJ holds any information relevant to part 3 of the request. He asked the MOJ about the searches it had undertaken to in order to respond to the request.

17. In response, the MOJ said:

“The strategic review, known as the Next Generation of Accredited Programmes (NG-AcP), is a multi-phase project that remains in development. We conducted searches of all documents and e-mails related to the NG-AcP on shared drives, personal devices, and e-mail accounts. Search terms included the titles of the project (the aforementioned “Strategic Review”, “Next Generation of Accredited Programmes” and derivatives thereof), as well as manual searches through files stored in the same locations. It was found that there was no document within the scope of [the complainant’s] request.”

18. The MOJ advised that, if any information was held, it would be held both manually and electronically. It confirmed that no information was held that had since been deleted or destroyed and said that there was no business or statutory reason for it to hold the requested information.

19. On 2 August 2022, the Commissioner made further enquiries with the MOJ as he thought it feasible that some recorded information could exist.

20. The MOJ responded as follows on 5 August 2022:

“The Business Unit responsible for the review have confirmed that there was no document which met the scope of [the complainant’s] request held at the time. As we said in our response, our work in reviewing accredited programmes is still in progress, any document created subsequently that fell within the terms of [the complainant’s] request would, at the present time, be exempt from disclosure under section 35(1)(a) of the FOIA, as it would constitute information relating to the formulation or development of government policy. As section 35 is a qualified exemption, we would need to consider whether the balance of the public interest favoured disclosing or withholding the document or documents in question.”

21. The Commissioner is satisfied that he has required the MOJ to carry out further checks which have not resulted in it locating any recorded information in scope. He is mindful that the balance of probabilities test

simply means more likely than not, so the Commissioner is only required to be 51% sure that no information is held.

Conclusion

22. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out earlier, the Commissioner is required to make a finding on the balance of probabilities.
23. The complainant's arguments submitted with his complaint to the Commissioner as to why he believes there may be information held relevant to his request have been relayed to, and considered by, the MOJ. It is important to recognise that just because a complainant considers that a public authority 'should' hold the requested information does not mean that it will.
24. Based on the explanations provided by the MOJ, the Commissioner is satisfied, on the balance of probabilities, that no recorded information within the scope of part 3 of the request is held.

Right of appeal

25. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

26. 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.
27. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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