

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to the average size of a prison cell, including those in HMP Leeds and HMP Wakefield. The Ministry of Justice (MoJ) stated that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probabilities, the MoJ does not hold the requested information.
3. He requires no steps to be taken as a result of this decision.

Request and response

4. On 8 December 2015 the complainant made the following request for information under the FOIA:

"I am looking to find out the following information through the Freedom of Information Act 2000.

What the average size of a cell is in (a) male and (b) female prisons in Yorkshire and Humberside".

5. On 9 December 2015 the complainant made the following, related, request for information under the FOIA:

"I am emailing to request the following information...

1). What the average size of a cell is in all female prisons

- 2). *What the average size of a cell is in HMP Leeds*
- 3). *What the average size of a cell is in HMP Wakefield*".
6. The MoJ responded on 27 January 2016. It denied holding the requested information, explaining that there was no central record of the size of prison cells.
7. The complainant requested the MoJ to review its response to those parts of the request relating to the average size of a cell in HMP Leeds and HMP Wakefield. They told the MoJ:

"...surely each individual prison must know the average size of their own prison's cells...".
8. The MoJ provided an internal review on 18 February 2016 in which it maintained its original position.

Scope of the case

9. The complainant provided the Commissioner with the relevant documentation on 14 March 2016 to complain about the way his request for information had been handled.
10. The complainant told the Commissioner that they consider that the average size of a prison cell in both HMP Leeds and Wakefield:

"is information that can be attained by each individual prison respectively".
11. The analysis below considers the MoJ's assertion that the information requested in parts (2) and (3) of the complainant's request dated 9 December 2015 is not held.

Reasons for decision

Section 1 general right of access

12. 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."

13. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of Information Rights Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, he must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the MoJ holds the requested average size of a cell in HMP Leeds and HMP Wakefield.
15. In deciding where the balance of probabilities lies, the Commissioner will consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and results the searches yielded. He will also consider any other information or explanation offered by the public authority which is relevant to his determination.
16. In progressing his investigation, the Commissioner asked the MoJ to respond to him, including with respect to:
 - the searches it carried out for information falling within the scope of the request and the search terms used; and
 - whether the MoJ has a business purpose for which the requested information should be held.
17. In its substantive response to the Commissioner, the MoJ confirmed what it had told the complainant – that there is no central record of the size of prison cells. It also confirmed that there is no legal or business requirement for the information to be held.
18. With regard to the nature of the searches it had conducted, MoJ told the Commissioner:

"When searching for this information the following areas checked their electronic and paper based systems:

- *MoJ Estates Directorate*
- *NOMS Finance team*

- *HMP Leeds*
- *HMP Wakefield*

19. In its correspondence both with the complainant and the Commissioner, the MoJ explained:

"The prison estate dates back over 150 years and comprises a variety of cell sizes and configurations, including single cells, double cells – both with and without showers – and cells adapted for prisoners with low mobility. All these types of cells have different dimensions and floor spaces".

20. The MoJ confirmed that while it holds drawings that reflect the intended design of the prisons specified in the requests, they may not reflect modifications that have taken place. It also stated that the drawings contain the statement:

"Do not scale off this drawing".

21. MoJ stated that it had checked what information is held for the purpose of capital valuations. In that respect it confirmed that NOMS Finance only hold the Gross Internal Area (GIA) of an entire prison for the purposes of capital valuations and do not hold data on cell sizes.

22. The MoJ advised that, in order to determine the average size of a cell in the specified prisons, it would be necessary to measure every cell to determine its size and then calculate an average.

23. The Commissioner's guidance to the public on how to access information from a public body states¹:

"Your request can be in the form of a question, rather than a request for specific documents, but the authority does not have to answer your question if this would mean creating new information or giving an opinion or judgment that is not already recorded".

24. In its advice to organisations about the FOIA, the ICO website states²:

¹ <https://ico.org.uk/for-the-public/official-information/>

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/>

"The Act does not cover information that is in someone's head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it".

25. While appreciating the complainant's frustration that the MoJ does not hold the specific information he has asked for, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ (EA2006/0085)*³ that the FOIA:

"does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

26. Having considered the MoJ's response, and on the basis of the evidence provided to him, the Commissioner is satisfied that on the balance of probabilities the MoJ does not hold the requested information.
27. The Commissioner therefore considers that the MoJ has complied with its obligations under section 1(1) of the FOIA.

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

Right of appeal

28. 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

29. 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.
30. 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