

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 January 2017

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

### Decision (including any steps ordered)

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1. In a multi-part request, the complainant requested information relating to the provision of food for Jewish prisoners. The Ministry of Justice (MoJ) applied section 14(2) of the FOIA (repeated request).
2. Having considered its handling of part (1) of the request, the Commissioner's decision is that the MoJ did not apply section 14(2) appropriately to that part 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 (1) of the request not relying on section 14(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. By way of background to the request that is the subject of this decision notice, the complainant told the Commissioner that he had made the following request for information to the MoJ on 3 January 2016:

*"The instructions, advice and guidance given by Michael Binstock to HMP Wakefield which in any way relate to the provision of kosher food to Orthodox Jewish prisoners at HMP Wakefield during 2014/2015.*

*In particular, a full account of the instructions, advice and guidance given by Michael Binstock to HMP Wakefield regarding the processes and procedures by which an Orthodox prisoner who observes kashrut may supplement his diet.*

*The instructions, advice and guidance given by Michael Binstock that permitted the supply of additional kosher food to a Mr [name redacted], an Orthodox Jewish prisoner at HMP Wakefield in 2014-2015.*

*On how many occasions has Michael Binstock provided advice to the Catering Department at HMP Wakefield since June 2015?*

*The Guidance- and its sources- followed by HMP Wakefield in respect of kosher food for Orthodox prisoners".*

6. Michael Binstock is the Jewish Faith Advisor to HM Prison Service<sup>1</sup>.
7. The MoJ responded to that request on 2 February 2016 and provided its internal review response on 11 March 2016. It confirmed it held some information which it provided to the complainant. It said that it did not hold the remainder.
8. The complainant referred to that internal review response in the preamble to the request under consideration in this decision notice.

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<sup>1</sup> <https://www.theus.org.uk/prison-visiting>

## Request and response

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9. On 18 March 2016, having received the MoJ's internal review response to an earlier request (request dated 3 January 2016), the complainant wrote to the MoJ and made the following multi-part request for information under the FOIA:

*"1) If the Internal Review response is correct and all the Jewish faith adviser did was to confirm that the named individual was an observant Haredi Jew, please provide me with copies of the relevant data which details who and on what authority was responsible for providing the Governors of HMP Wakefield, HMP Manchester, HMP Leeds and elsewhere with the relevant instructions, guidance, and advice that allowed the named individual in question to receive a refrigerator for his personal use and a regular supply of kosher food?*

*2) Please provide me with the relevant data which details the relevant instructions, guidance, and advice, given to prison governors, with particular reference to the Governor of HMP Wakefield, a high security prison, which in 2015/2015 [sic] authorised a Haredi Jewish prisoner to be provided with a refrigerator for his personal use and a regular supply of kosher food.*

*3) Please provide me with details of the items of additional food that the individual authorised to receive and did in fact receive".*

10. The MoJ responded on 7 April 2016. It told the complainant that it had previously complied with his request for information on 10 February 2016 and 11 March 2016. The MoJ explained to the complainant that, under section 14(2) of the FOIA, it was not obliged to respond to any substantially similar or identical request that it received within a reasonable time period since complying with his original request.
11. It is accepted that while there is an error in the February date quoted by the MoJ - the date of the refusal was in fact 2 February 2016 - the relevant dates relate to the MoJ's refusal and internal review of the request for information dated 3 January 2016.
12. The complainant requested an internal review on 21 June 2016. In that correspondence he told the MoJ:

*"......please accept from me that for a prisoner to be allowed to have his own personal fridge sent in is absolutely extraordinary.*

*So, my Request dated 18 March 2016 says, in effect, if, as you claim in IR [reference redacted], it was not Michael Binstock who gave those instructions then who was it? That's the request".*

13. In the circumstances of this case, the Commissioner exercised her discretion to accept the complaint without the MoJ having conducted an internal review.

### **Scope of the case**

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14. Following earlier correspondence, the complainant contacted the Commissioner on 12 July 2016 to complain about the way his request for information had been handled.

15. The complainant disputes that his request of 18 March 2016 is identical or substantially similar to a previous request he has made to the MoJ.

16. He reiterated what he had told the MoJ - that his request dated 18 March 2016:

*"... says, in effect, if, .... it was not Michael Binstock who gave those instructions then who was it? That's the request".*

17. He also told the Commissioner that, in his view, the MoJ had deliberately omitted the words "*a refrigerator for his personal use*" when it reproduced his request in its response. The complainant had highlighted the omission to the MoJ when requesting an internal review.

18. As is her practice, during the course of her investigation, the Commissioner invited the MoJ to revisit the request. She also drew the complainant's concern about the accuracy of the recording of his request to the attention of the MoJ.

19. The Commissioner asked the MoJ to notify both herself and the complainant if it decided to reverse or amend its position. The Commissioner explained that she would consider new exemptions but that it was the MoJ's responsibility to tell the complainant why the new exemption applies.

20. In its response, the MoJ confirmed that the request was refused under section 14(2) of the FOIA.

21. In its correspondence with the Commissioner the MoJ referred to the complainant's "*constant rephrasing of his requests and overlapping correspondence*" and the "*continued burden his requests pose to the department*".

22. The Commissioner accepts that those are terms often used by a public authority in scenarios where it considers that section 14(1) of the FOIA (vexatious request) applies. However, the Commissioner has not been provided with any evidence, as she would require, that the MoJ told the complainant that, having revisited the matter, it considered the request vexatious and that section 14(1) applied.
23. Accordingly, and in light of the complainant's explanation about the nature of his complaint, the analysis below considers the MoJ's application of section 14(2) of the FOIA to part (1) of the request.

## Reasons for decision

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### *Section 14 vexatious or repeated requests*

24. Section 14(2) of the FOIA states that:

*"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request".*

25. This means that section 14(2) of the FOIA may only be applied when all three of the following criteria have been fulfilled:
  - the request is identical or substantially similar to a previous request from the same requester;
  - the authority has previously provided the information to the requester or confirmed that it is not held in response to the earlier FOIA request; and
  - a reasonable interval has not elapsed between the new request and compliance with the previous request.
26. In a case such as this where the request is a multi-part request, the public authority needs to treat each element of a multi-part request as a separate request and can only refuse any repeated elements under section 14(2).

27. With respect to when an organisation can refuse a request because it is repeated, the Commissioner's website states<sup>2</sup>:

*"You can refuse requests if they are repeated, whether or not they are also vexatious. You can normally refuse to comply with a request if it is identical or substantially similar to one you previously complied with from the same requester. You cannot refuse a request from the same requester just because it is for information on a related topic. You can do so only when there is a complete or substantial overlap between the two sets of information".*

28. In her published guidance on repeated requests<sup>3</sup> the Commissioner also states that:

*"If the authority has not already provided the information to the requester, then it must deal with the request in the normal manner".*

29. During the course of her investigation, the Commissioner asked the MoJ to explain, with reference to the above three criteria, on what basis it considered section 14(2) applied.

*Was the present request made by the same requester?*

30. In refusing to comply with this request, the MoJ told the complainant that it had previously complied with his request for information dated 3 January 2016.

31. In its submission to the Commissioner, the MoJ said that the complainant had submitted *"a number of requests relating to the provision of food for Jewish prisoners"*. It provided her with details of those requests and their outcomes.

32. The Commissioner has considered the request of 18 March 2016 and is satisfied that it is from the same requester as the request of 3 January 2016. She is also satisfied that the other requests referenced by the MoJ are from the same requester.

33. The next step is to determine whether the present request is identical or substantially similar to a previous request submitted by this requester.

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1195/dealing-with-repeat-requests.pdf>

*Is the present request identical or substantially similar?*

34. The Commissioner's published guidance on repeated requests states:

*"A request will be identical if both its scope and its wording precisely matches that of a previous request.*

*If the wording is identical but the scope of the request is different ... the request will not be identical".*

*Is the request identical?*

35. During the course of the Commissioner's investigation, the MoJ provided the Commissioner with details of the complainant's request for information dated 3 January 2016, together with requests from the same requester dated 20 July 2015, 30 November 2015 and 22 January 2016.

36. Having considered the wording and scope of the request of 3 January 2016 and of part (1) of the request dated 18 March 2016, the Commissioner finds that the request is not identical. She reached that conclusion on the basis that both its wording and its scope do not precisely match that of a previous request.

37. Accordingly, she next considered whether the request at issue is substantially similar to a previous request.

*Is the present request substantially similar to a previous request submitted by this requester?*

38. The Commissioner's guidance states that a request will be substantially similar if it meets either of the following criteria:

- the wording is different but the scope of the request (the criteria, limits or parameters which define the information being sought) is the same as for a previous request; or
- the scope of the request does not differ significantly from that of the previous request (regardless of how the request is phrased).

39. The Commissioner's guidance also addresses the scenario where there is an overlap in the scope of the requests.

40. The Commissioner considers that if there is an overlap in the scope of the requests, then the question as to whether they are substantially similar will depend on the significance of those differences in scope. If the area in which the requests differ is insignificant, then the second request may be considered substantially similar.

41. However, if the difference in scope is clearly of more than minor significance, then the requests will not be substantially similar for the purposes of the FOIA, and the authority will need to deal with the new request in the normal manner.
42. Furthermore, the Commissioner's guidance states that section 14(2) cannot be applied to requests where only the subject or theme is identical or substantially similar. This principle was established in the Tribunal decision of *Robert Brown vs ICO* (EA/2006/0088, 2nd October 2007).
43. While accepting that he has made earlier requests for information about the provision of food for Jewish prisoners, the complainant told the Commissioner that he considered that his present request was a completely new one.
44. He told the Commissioner:

*".. there was no mention of a refrigerator in my earlier requests".*
45. In its submission to the Commissioner, the MoJ told her:

*"[The requester] has submitted a number of requests relating to the provision of food for Jewish prisoners and these must be looked at together to support the refusal of this request as repeated. The overlapping nature of the request and subtle changes to the phrasing has led to [the requester] being provided with the same information on a number of occasions".*
46. As noted above, the MoJ provided the Commissioner with a chronology of those requests and their outcomes.
47. The MoJ told the Commissioner:

*"what is clear from the other requests on the same theme is that he [the requester] has already been provided with information regarding the catering of Jewish prisoners".*
48. The Commissioner has considered the requests for information referred to by the MoJ – requests dated 20 July 2015, 30 November 2015, 3 January 2016 and 22 January 2016 – and the present request.
49. The Commissioner acknowledges that in each case the requester is seeking information regarding the provision of food for Jewish prisoners, including with respect to who/where instructions/directions relating to the provision of kosher food to a named individual originated from.
50. To that extent, she accepts that the requests relate to the same subject or theme. However, as noted above, section 14(2) cannot be applied to



requests where only the subject or theme is identical or substantially similar.

51. The Commissioner noted that question (3) of the 3 January 2016 request asked to be provided with the instructions etc. given by the Jewish Faith Adviser that permitted the supply of additional kosher food to a named individual. She also noted that, in question (1) of the request in this case, the complainant asked, if not Michael Binstock, then who gave the instructions etc. that allowed the individual in question to receive a refrigerator for his personal use and a regular supply of kosher food.
52. In other words, the request under consideration in this case relates not only to the provision of food for Jewish prisoners but also to information relating to who was responsible for providing the relevant instructions, guidance, and advice that allowed the named individual to receive a refrigerator for his personal use.
53. The Commissioner considered that there was an overlap in the scope of the requests in that the requester was not only seeking information about the provision of food but also seeking information in relation to the provision of a refrigerator.
54. The Commissioner's guidance<sup>4</sup> states that if there is an overlap in the scope of the requests then the question as to whether they are substantially similar will be dependent upon the significance of those differences in scope.
55. In that respect her guidance also states:

*"Public authorities will need to make a judgement about the significance of any difference in scope, taking into account what they know about their own records and practice and the context in which the request is made. If a complaint is made to the ICO then we would expect a public authority to be able to explain why it has decided that any differences in scope are insignificant".*
56. Accordingly, referring to the differences in the request that the complainant had highlighted, the Commissioner asked the MoJ to explain why, if it was the case, the MoJ had decided that any differences in scope are insignificant.
57. The MoJ was silent on that point.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1195/dealing-with-repeat-requests.pdf>

58. In the absence of an explanation as to why the MoJ decided that any differences in scope are insignificant, the Commissioner cannot be satisfied that that is the case. It follows that she was unable to find that the request was substantially similar for the purposes of the FOIA.
59. As the Commissioner determined that the request was not substantially similar, she did not go on to consider whether the MoJ had previously provided the information or confirmed it is not held, nor whether a reasonable interval had elapsed.
60. In light of the above, the Commissioner considered that the MoJ did not apply section 14(2) appropriately to part (1) of the request of 18 March 2016.

### **Other matters**

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61. The complainant told the Commissioner that his request "*was not perfectly represented*" in the MoJ's response dated 7 April 2016. He told the Commissioner that, in his view, the MoJ had deliberately omitted the words "*a refrigerator for his personal use*" when it reproduced his request in its response.
62. The Commissioner was provided with a copy of the request for information both by the complainant and the MoJ. Having considered both copies of the correspondence, the Commissioner would stress the need for public authorities to reproduce the wording of a request accurately.

## Right of appeal

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63. 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)

64. 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.

65. 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**